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Supreme Court, U.S.
FILED

No. 09-095 AUG 12 2009

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In The

# Supreme Court of the United States

DAN REUST,

*Petitioner,*

v.

THE STATE OF ALASKA,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Alaska**

## PETITION FOR WRIT OF CERTIORARI

*For Petitioner*

ARTHUR S. ROBINSON
ROBINSON & ASSOCIATES
35401 Kenai Spur Highway
Soldotna, Alaska 99669
Ph: 907-262-9164
Fax: 907-262-7034
Chuck@robinsonandassociates.net

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

## QUESTIONS PRESENTED

The Supreme Court of the State of Alaska upheld the validity of a state statute that took a percentage of Reust's recovery in a civil action for public use, aligning the Alaska Supreme Court with the Ninth Circuit and six State Supreme Courts that have held such statutes constitutional and furthering the split with two State Supreme Courts that have held such statutes violate the Takings Clause of the Fifth Amendment to the United States Constitution. The first question presented is:

1. Whether a state statute that allows a percentage of a civil judgment to be taken for public use violates the Takings Clause of the Fifth Amendment to the United States Constitution?

The Supreme Court of the State of Alaska upheld the taking of a percentage of Reust's recovery even though the recovery was through a settlement and not a judgment as required by the State statute. The second question presented is:

2. Did the taking of a percentage of Reust's civil recovery violate the Due Process Clause of the Fourteenth Amendment?

## PARTIES

1. Dan Reust is a citizen of the State of Alaska and the United States and former employee of Alaska Petroleum Contractors, Inc. ("APC").

2. The State of Alaska intervened in Reust's civil matter to protect its alleged statutory entitlement to take a portion of any punitive damages awarded to Reust.

3. Dan Reust and APC, entered into a settlement agreement resolving all issues. (App. 75-82). APC is not named in this petition because the question presented arises solely from a dispute between Dan Reust and the State of Alaska and Reust agreed to indemnify and hold APC harmless from any claim the State may have regarding its right to share in an award of punitive damages. (App. 78).

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## OPINIONS AND ORDERS BELOW

The first opinion from the Alaska Supreme Court is reported at *Reust v. Alaska Petroleum Contractors, Inc.* (*Reust I*), 127 P.3d 807 (Alaska 2005). The opinion is provided in the Appendix. (App. 12-63). The second opinion from the Alaska Supreme Court is reported at *Reust v. Alaska Petroleum Contractors, Inc.* (*Reust II*), 206 P.3d 437 (Alaska 2009). The opinion is provided in the Appendix. (App. 1-11). The Alaska Supreme Court's order denying rehearing is not reported and is provided in the Appendix. (App. 66).

## JURISDICTION

The Alaska Supreme Court filed its final opinion on April 10, 2009. (App. 1-11). The petition for rehearing was denied on May 15, 2009. (App. 66). This Court has jurisdiction to review a final decision of the highest State Court, deciding a federal question, under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Takings Clause of the Fifth Amendment of the United States Constitution provides that private property shall not be taken for a public purpose without just compensation. The Takings Clause of the

Fifth Amendment was made applicable to the States under the Fourteenth Amendment.

The Fourteenth Amendment to the United States Constitution provides that no State may deprive any person of life, liberty, or property, without due process of law.

Alaska Stat. § 09.17.020(j) provides that if a person receives an award of punitive damages the court shall require that fifty-percent of the award be deposited in the State's general fund, however, the statute does not grant the State the right to file or join a civil action to recover punitive damages. (App. 67-71).

## STATEMENT OF THE CASE

Dan Reust sued APC for wrongful termination, claiming his discharge violated Alaska public policy regarding protection of Court witnesses. (App. 14-16). A trial jury found that Reust was hired by APC and then unlawfully terminated. *Id.* The jury awarded Reust damages of $132,200 for past wage loss, $156,800 for future wage loss, and $100,000 for non-economic losses for "emotional distress, mental anguish and anxiety." It also found that Reust was entitled to recover punitive damages. (App. 15-16).

Following a required second phase of the trial, the jury awarded Reust punitive damages in the amount of $4.3 million. (App. 15-16). This amount

was later reduced by the trial court when it applied a statutory cap to the punitive award. (App. 16). Reust sought to have parts of the Alaska tort reform legislation declared unconstitutional. The State of Alaska was allowed to intervene to defend the constitutionality of Alaska Statute 09.17.020(j). (App. 16, 1-11). The trial court denied Reust's motion, reduced the punitive damages award to $500,000 under AS 09.17.020(h), and directed that fifty-percent of the award be allocated to the State under AS 09.17.020(j). (App. 12, 15-16). Reust appealed to the Alaska Supreme Court seeking a declaration that AS 09.17.020(j) was an unconstitutional taking of his property without just compensation in violation of the 5th Amendment of the United States Constitution and a deprivation of his property interest in violation of the Due Process Clause of the 14th Amendment to the United States Constitution. (App. 45-49, 51-55).

Reust claimed that the allocation requirement in AS 09.17.020(j) is an unconstitutional taking because it deprives him of a property right in his punitive damages claim without just compensation. (App. 51-55). The Alaska Supreme Court rejected Reust's claim, relying on its prior decision in *Anderson v. State ex rel. Central Bering Sea Fishermen's Ass'n* (*Anderson II*), 78 P.3d 710 (Alaska 2003). (App. 51-52). The Alaska Supreme Court concluded that AS 09.17.020(j) does not violate the Takings Clause of the Alaska Constitution or the Federal Constitution. (App. 51-55). The Court also concluded that it was not a violation of the Due Process Clause. (App. 49).

However, the Alaska Supreme Court remanded the trial court's punitive damages judgment for recalculation of the punitive damages award because the trial court applied the wrong statutory cap in reducing the amount of punitive damages determined by the jury. (App. 55-57). The Alaska Supreme Court instructed the trial court, on remand, to recalculate the punitive damages by applying the statutory cap found in AS 09.17.020(f). (App. 60). Although, during the original trial, the jury was instructed by trial court instructions to consider the factors listed in AS 09.17.020(c), and, although AS 09.17.020(c) allows the fact finder to consider the seven factors listed in determining the amount of punitive damages, the Alaska Supreme Court instructed the trial judge, on remand, to make these factual findings by applying the seven factors listed in Section (c) of the Statute to ensure the amount entered in the judgment on remand would not be excessive. (App. 60). This was, in effect, reversal of the trial court's punitive damages judgment. The trial court was also instructed to determine whether the recalculated amount of punitive damages would be excessive in light of *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574-575, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996). (App. 57).

On remand from the Alaska Supreme Court, Reust settled his claims with APC before entry of a final judgment for punitive damages. (App. 75-52). In the settlement agreement Reust and APC agreed that no award or judgment for punitive damages would be entered against APC. (App. 76-77). Reust agreed to

indemnify, defend and hold APC harmless against any claim by the State of Alaska for punitive damages arising under AS 09.17.020(j). (App. 78). Reust and APC then filed a stipulation for dismissal in the trial court. (App. 3-4). The State objected to dismissal. *Id.* The trial court ordered that the settlement agreement was valid and would be enforced, but it refused to dismiss the case. (App. 62). Although the settlement agreement stated that no judgment would be entered, the trial court then entered a final judgment for the State against APC and Reust's settlement proceeds in the amount of $207,792.40 as its share of the trial court's calculated punitive damages judgment. (App. 64). Reust again appealed the trial court's judgment to the Alaska Supreme Court. (App. 1-11).

In the second appeal, Reust argued that Alaska's split-recovery statute, AS 09.17.020(j) was unconstitutional. (App. 1-11). The Alaska Supreme Court again rejected Reust's constitutional challenge, affirming the trial court's decision. (App. 10-11). Reust filed a petition for rehearing with the Alaska Supreme Court and the petition for rehearing was denied on May 15, 2009. (App. 66).

## REASONS FOR GRANTING THE PETITION

### A. Does a state statute that allows a percentage of a civil judgment to be taken for public use violate the Takings Clause of the Fifth Amendment to the United States Constitution?

This Court should accept review of this issue of national importance: whether a State may take a share of punitive damages awarded in a civil case and place a portion of the award in the State's general fund. Applying Alaska's "split-recovery" statute, the Alaska Courts ordered judgment in favor of the State of Alaska for a portion of Reust's settlement proceeds. In taking a portion of the settlement proceeds related to a state tort claim, the State took that "property" away from Reust and did not compensate Reust for that taking as required by the Takings Clause of the U.S. Constitution.

Split-recovery statutes attempt to reduce some of the plaintiff's windfall by allocating part of the punitive award to the state. *See, e.g., Charles F. G. Parkinson, Note, A Shift in the Windfall: An Analysis of Indiana's Punitive Damages Allocation Statute and the Recovery of Attorney's Fees Under the Particular Services Clause*, 32 Val. U. L. Rev. 923, 943-944 (1998) (describing split-recovery statutes). Although the plaintiff shares in the award to compensate for bringing the punitive claim in the first place, *see Smith v. Wade*, 461 U.S. 30, 58 (1983) (Rehnquist, J., dissenting) ("Punitive damages are justified as a 'bounty' that encourages private lawsuits seeking to

assert legal rights."); the state takes the balance of this property interest to use for the public benefit. *See E. Jeffrey Grube, Note, Punitive Damages: A Misplaced Remedy*, 66 S. Cal. L. Rev. 842, 854 (1993) ("Society could put punitive damages awards to better use than allowing individual civil plaintiffs windfall recoveries."). Several states have enacted split-recovery statutes. *See* 35 St. Mary's L. J. 207, 208 (St. Mary's University of San Antonio 2003). Some of those statutes have been scrutinized by the courts.[1]

Alaska Statute 09.17.020(j) was enacted in 1997 as part of Alaska's tort reform legislation. *Evans v. State*, 56 P.3d 1046, 1048 (Alaska 2002). The statute requires that half of all punitive damages awards received by a plaintiff be paid into the state treasury. *Id.* In adopting this provision, the Alaska Legislature took the five-billion dollar punitive damages award against Exxon into account and that award along with the State's inability to share in that award, was likely part of the impetus for adoption of this "split-recovery" provision. *See* http://www.legis.state.ak.us/cgibin/folioisa.dll/cm20/query=!22punitive+damages!22/doc/%7B@1175%7D?

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[1] *See Kirk v. Denver Publ'g Co.*, 818 P.2d 262 (Colo. 1991); *Gordon v. State*, 608 So.2d 800 (Fla. 1992) (per curiam); *Mack Trucks, Inc. v. Conkle*, 436 S.E.2d 635 (Ga. 1993); *Spaur v. Owens-Corning Fiberglas Corp.*, 510 N.W.2d 854 (Iowa 1994); *Fust v. Attorney Gen.*, 947 S.W.2d 424 (Mo. 1997) (en banc); *Tenold v. Weyerhaeuser Co.*, 873 P.2d 413 (Or. Ct. App. 1994).

State Courts are sharply divided over whether split-recovery statutes pass constitutional muster. The Supreme Court in six states upheld the statutes against federal takings challenges. *Cheatham v. Pohle*, 789 N.E.2d 467, 474-475 (Ind. 2003); *Evans v. State*, 56 P.3d 1046, 1058 (Alaska 2002); *Mack Trucks, Inc. v. Conkle*, 263 Ga. 539, 436 S.E.2d 635, 639 (1993); *Gordon v. State*, 608 So.2d 800, 801-802 (Fla. 1992) (per curiam); *Shepard Components, Inc. v. Brice Petrides-Donohue & Associates*, 473 N.W.2d 612, 619 (Iowa 1991). Two State Supreme Courts have held the statutes violate the federal Takings Clause. *Kirk v. Denver Publishing Co.*, 818 P.2d 262, 273 (Colo. 1991); *Smith v. Price Development Co.*, 125 P.3d 945 (Utah 2005). One U.S. District Court has held that a split-recovery statute violates the Excessive Fines Clause. *McBride v. Gen. Motors, Corp.*, 737 F.Supp. 1563, 1578 (M.D. Ga. 1990).

The two State Supreme Courts that have sustained a constitutional challenge and the United States District Court decision from the Middle District of Georgia are also in conflict with other federal courts, including *Engquist v. Oregon Dept. of Agriculture*, 478 F.3d 985, 1004-1005 (9th Cir. 2007) (certiorari granted, in part); *Engquist v. Or. Dep't of Agric.*, 128 S.Ct. 977, 169 L.Ed.2d 800, 2008 U.S. LEXIS 749, 76 U.S.L.W. 3371 (2008) (certiorari was denied on the question presented in this petition).

Alaska's split-recovery punitive damages statute provides in pertinent part:

> If a person receives an award of punitive damages, the court shall require that 50 percent of the award be deposited into the general fund of the state. This subsection does not grant the state the right to file or join a civil action to recover punitive damages.

Alaska's split-recovery statute is substantially similar to Colorado's, which was held to be an unconstitutional taking in *Kirk*, 818 P.2d at 273 and then repealed by the Colorado Legislature. (App. 72-74). The Colorado statute read in relevant part:

> One-third of all reasonable damages collected pursuant to this section shall be paid into the state general fund. The remaining two-thirds of such damages collected shall be paid to the injured party. Nothing in this subsection (4) shall be construed to give the general fund any interest in the claim for exemplary damages or in the litigation itself at any time prior to payment becoming due.

There is clearly a conflict between the Alaska Supreme Court and the Colorado Supreme Court on this federal question. *Reust I* (*supra*); *Reust II* (*supra*) and *Kirk*, 818 P.2d at 273. The Alaska Supreme Court's decision also appears to be in conflict with the Ninth Circuit's decision in *Engquist*, at least in part.

The Alaska Supreme Court determined that *Reust* had a property interest but the interest was limited by AS 09.17.020(j). *Reust I*, 127 P.3d at 823; *Reust II*, 206 P.3d at 440. In *Engquist*, the Court of Appeals for the Ninth Circuit recognized that if the award was property, taking a percentage on behalf of the State would be a taking under the Takings Clause. The Ninth Circuit, however, held it was not property. *Engquist*, 478 F.3d at 1001 n. 18. The Ninth Circuit concluded that since punitive damages are not awarded as a matter of right but are a discretionary decision made by a jury, any interest to be protected was too speculative to constitute property under the Takings Clause. *Id.*, at 1004. The Alaska Supreme Court appears to be in conflict with the Ninth Circuit and to the extent they are aligned, both are in conflict with prior decisions from this Court as to what constitutes property.

There is no clear test for what constitutes property under the Takings Clause. However, in *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 118 S.Ct. 1925, 141 L.Ed.2d 174 (1998), the Court concluded that the interest gained from the State of Texas' Interest on Lawyers' Trust Accounts involved property for purposes of the Takings Clause. The reasoning applied in *Phillips* supports Reust's view that the Ninth Circuit Court of Appeals had it wrong, when it concluded that the interest in punitive damages was too speculative to constitute property, and the Alaska Supreme Court had it wrong when it concluded that the interest was modified by AS

09.17.020(j). In *Phillips*, this Court held that the interest that might accumulate was property because it attached as a relevant incident to ownership of the principal amount in the trust fund. *Phillips*, *supra*, 524 U.S. at 168.

Applying the *Phillips'* reasoning here, the property right to punitive damages attaches as a relevant incident to the property interest in a cause of action. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S.Ct. 1148, 72 L.Ed.2d 265 (1982) (it is settled law that a cause of action is a species of property protected by the due process clause). In *Phillips*, this Court relied on the fact that accumulated interest follows principal and a property interest in the principal extended to a property right in the interest that might accumulate. *Phillips*, 524 U.S. at 165. Reust's property right in punitive damages extends from the property right in his cause of action and therefore attached when his cause of action accrued. *See Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1949) (legal right to have trustee answer for negligent impairment of interest was a property right for purposes of the due process clause).

The Court of Appeals for the Ninth Circuit and the Alaska Supreme Court had it wrong; Colorado had it right in *Kirk*. Colorado held that there was a property interest that could not be taken without just compensation. *Kirk*, 818 P.2d at 273. Colorado held there was a property interest in the cause of action, *Kirk*, at 267; and the interest in punitive damages

attached before the actual award. *Kirk*, at 270-273. Reason dictates that because the property interest attaches when the cause of action accrues; a taking of that interest after a determination of the property's value via an award constitutes a taking under the Takings Clause and just compensation must be paid by the State.

Reust had a property interest in his cause of action against APC and, by extension, he had a property interest in any future award whether compensatory or punitive. That property interest attached when the cause of action accrued and before the split-recovery provision was triggered by an award. The Alaska Supreme Court held that the State's interest did not attach until the jury verdict was rendered. (App. 5-6). Reust's interest attached even before the lawsuit was filed. AS 09.17.020(j) is triggered by the award, thus it constitutes a taking because the State's alleged right to take the property attached long after Reust's property interest was vested.

The constitutional violation in this case is more egregious in light of the fact that Reust settled with APC before the entry of a final judgment and before the actual amount of punitive damages had been set by the Court. (App. 5-6). This settlement prevented attachment of the State's right under AS 09.17.020(j), however, the State seeks to take part of the settlement proceeds under that provision. The State seeks to do so without compensating Reust for the taking. That constitutes the taking of a property

interest without just compensation in violation of the Takings Clause.

**B. Did the taking of a percentage of Reust's civil recovery violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution?**

Reust twice raised the question whether the split-recovery provision of AS 09.17.020 violated his due process rights before the State Court. (App. 51-55). In its second and most recent opinion, the Alaska Supreme Court merely referred to its prior decisions on this issue; essentially ignoring the fact that Reust's claim was based on a new set of facts. (App. 9 fn. 17). The facts that changed are: Reust settled his claim with APC before the entry of a judgment in favor of the State and thus, no award existed for purposes of the split-recovery provision. (App. 75-82, 1-11). Even in the absence of an "award", the trial court took Reust's property interest in his settlement proceeds without just compensation and misapplied the statute. (App. 62-64). This violated Reust's due process rights under the 14th Amendment of the United States Constitution.

The state's interest in punitive damages vests after entry of a judgment and the damages are actually received by a judgment creditor. AS 09.17.020(j) (App. 5-6). There is no "award" until the trial court enters a judgment for the amount. AS 09.17.020(d) *Id.* The Statute states that the fact

finder shall determine the amount and the trial court shall enter a judgment, thus the State's interest does not vest until there is a judgment and the noun "award" is synonymous with judgment. *Id.* This is consistent with the common definition of "award."

The plain meaning of the noun "award" includes a judgment. Webster's Third New International Dictionary, 152 (unabridged ed. 2002). Similarly, Black's Law Dictionary defines award as "a final judgment or decision." Black's Law Dictionary, 147 (8th ed. 1999); *see* Black's Law Dictionary, 125 (5th ed. 1979). It is a fundamental and widely accepted rule that where a statute uses a word or term and does not define same, the courts must give such word or term its ordinary, plain and commonly accepted meaning. *Addison v. Holly Hill Fruit Products*, 322 U.S. 607, 618, 64 S.Ct. 1215, 88 L.Ed. 1488 (1944).

Here, there was no "award" prior to Reust entering into a settlement agreement for two reasons. First, the Alaska Supreme Court, in effect, vacated the prior judgment by directing the trial court to reconsider factors that should have been considered by the fact finder. (App. 57-60). Second, the trial court invaded the province of the jury to perform that fact finding and it did not enter its judgment until after Reust settled his claims with APC. (App. 75-82, 1-11); *see* AS 09.17.020(a) (fact finder shall determine the amount of punitive damages). There being no award prior to the settlement agreement, the State's right under the statute had not yet vested and when the trial court entered judgment in favor of the State and

against APC and Reust, the trial court granted the State a share of Reust's settlement proceeds and not a share of the punitive damages awarded in a final judgment in favor of Reust as contemplated by the statute. (App. 9-11). The statute upon which the State and the trial court relied, does not authorize the taking of settlement proceeds and as applied to Reust, this misapplication of the statute deprived Reust of property in violation of the Due Process Clause of the 14th Amendment.

In *Sniadach v. Family Finance Corporation of Bayview*, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969), this Court was confronted with the Wisconsin garnishee law. There a creditor, prior to judgment, could cause the defendant debtor's wages to be frozen without the opportunity to be heard. This Court struck down the law holding it violated procedural due process. The Court noted that it was making no judgment about whether the law was wise – the sole question is whether there has been a taking of property without that procedural due process required by the 14th Amendment. The Court concluded its opinion by saying:

> Where the taking of one's property is so obvious, it needs no extended argument to conclude that absent notice and a prior hearing . . . this prejudgment garnishment procedure violates the fundamental principles of due process.

*Sniadach*, *id.*, 395 U.S. at 342, 89 S.Ct. at 1823.

It is submitted that the taking of Reust's property interest in the settlement proceeds without any statutory authorization or procedure for the taking of such interest is an obvious violation of due process.

Following the *Sniadach*, decision, this Court in 1972 handed down *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972). There the Florida and Pennsylvania prejudgment replevin statutes were held violative of the Due Process Clause for failure to have notice and opportunity for hearing prior to seizure of property. The Court, speaking through Mr. Justice Stewart, said:

> The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions. The purpose of this requirement is not only to insure abstract fair play to the individual. Its purpose more particularly, is to protect his use and possession of property from arbitrary encroachment . . . the prohibition – . . . against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of government interference.

407 U.S. at 80, 92 S.Ct. at 1994. *See Lynch v. Household Finance Corp.*, 405 U.S. 538, 552, 92 S.Ct. 1113, 1122, 31 L.Ed.2d 424 (1972).

In *Lynch*, the Court said:

> The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a "personal" right, whether the "property" in question be a welfare check, a home or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.

Without the guarantee of due process as provided by our Constitution the right of private property cannot be said to exist. *Ochoa v. Hernandez y Morales*, 230 U.S. 139, 33 S.Ct. 1033, 57 L.Ed. 1427 (1913).

In 1978, this Court decided *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 98 S.Ct. 1554, 56 L.Ed.2d 30 (1978). The Memphis Light, Gas & Water Division of the City of Memphis terminated utility services of respondents without an opportunity for hearing. This Court held that such action violated the Due Process Clause of the 14th Amendment. In doing so, it relied on *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) to "provide a framework of analysis for determining the specific dictates of due process" in this case.

In *Mathews*, the Court identified three distinct factors to be considered:

> (1) The private interest that will be affected by the official action;
>
> (2) The risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and,
>
> (3) The Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Under the three preceding factors:

(1) The private interest affected is Reust's interest in settlement proceeds vested through a settlement agreement entered prior to the "award" that would have triggered AS 09.17.020(j).

(2) The risk of erroneous deprivation by misapplying a statute and taking property without any defined procedures that gives the State the right to take that property.

(3) Finally the government took the property without any statutory authorization and no administrative burdens of consequence would be placed on the government if the due process requirements were satisfied. The State took part of the settlement proceeds from a settlement agreement deemed valid and enforceable by the trial court and

that was entered into after the Alaska Supreme Court, in effect, vacated the first judgment because it was entered in error under Alaska law. It did so without any statutory or regulatory provisions authorizing the attachment or setting out the procedures for the attachment of settlement proceeds.

It is submitted that the taking here is automatic, complete and absolute and that, as applied, the Alaska Court's application of the statute violated Reust's due process rights under the 14th Amendment of the U.S. Constitution.

## CONCLUSION

There being a conflict between the different States on the question presented; and there being a conflict between certain State Courts and the Federal Courts on the question presented, the petition for writ of certiorari should be granted as to the first question presented. The taking of a property interest without just compensation presents a question of national importance and this case presents an opportunity to establish a clear test for determining what constitutes property for purpose of the Takings Clause. Should those property interests be determined based upon federal common law or does the Takings Clause only apply to property rights defined by State law?

There was a clear violation of due process when Reust's property was taken without statutory

authority and prior to any interest vesting in the State. The petition for writ of certiorari should be granted as to the second question presented.

Respectfully submitted,

ARTHUR S. ROBINSON
ROBINSON & ASSOCIATES
35401 Kenai Spur Highway
Soldotna, Alaska 99669
Ph: 907-262-9164
Fax: 907-262-7034
Chuck@robinsonandassociates.net

No. 09-_____

In The
# Supreme Court of the United States

DAN REUST,

*Petitioner,*

v.

THE STATE OF ALASKA,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Supreme Court Of State of Alaska**

## PETITIONER'S APPENDIX

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DAN REUST, Appellant, v. ALASKA PETROLEUM CONTRACTORS, INC., Appellee, and State of Alaska, Appellee/Intervenor.

Supreme Court No. S-12863, No. 6359

SUPREME COURT OF ALASKA

206 P.3d 437; 2009 Alas. LEXIS 30

April 10, 2009, Decided

SUBSEQUENT HISTORY: Rehearing denied by Reust v. Alaska Petroleum Contrs., Inc., 2009 Alas. LEXIS 79 (Alaska, May 15, 2009)

PRIOR HISTORY:

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Kenai, Charles T. Huguelet, Judge. Superior Court No. 3KN-99-132 CI.

COUNSEL: Arthur S. Robinson, Robinson & Associates, Soldotna, for Appellant.

Ruth Botstein, Assistant Attorney General, Talis J. Colberg, Attorney General, Anchorage, for Appellee/Intervenor State of Alaska.

JUDGES: Before: Fabe, Chief Justice, Matthews, Eastaugh, Carpeneti, and Winfree, Justices.

OPINION BY: MATTHEWS

OPINION

MATTHEWS, Justice.

This case is here for the second time.[1] After a jury awarded Dan Reust compensatory damages of $389,000 and punitive damages of $4.3 million in a retaliatory discharge suit against his employer, Alaska Petroleum Contractors (APC), the State was permitted to intervene to protect its interest in the punitive damages award.[2] The superior court reduced the punitive award to $500,000 using the "cap" provisions of AS 09.17.020(h) and required that half of the net award of punitive damages be paid to the State.[3]

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[1] *See* Reust v. Alaska Petroleum Contractors, Inc. (Reust I), 127 P.3d 807 (Alaska 2005).

[2] *Id.* at 810-11.

[3] *Id.* at 811. AS 09.17.020(f), (h) and (j) are involved in this case. These subsections provide:

> (f) Except as provided in (g) and (h) of this section, an award of punitive damages may not exceed the greater of
>
> (1) three times the amount of compensatory damages awarded to the plaintiff in the action; or
>
> (2) the sum of $500,000.
>
> . . . .
>
> (h) Notwithstanding any other provision of law, in an action against an employer to recover damages for an unlawful employment practice prohibited by AS 18.80.220, the amount of punitive damages awarded by the court or jury may not exceed
>
> (1) $200,000 if the employer has less than 100 employees in this state;
>
> (2) $300,000 if the employer has 100 or more but less than 200 employees in this state;
>
> (3) $400,000 if the employer has 200 or more but less than 500 employees in this state; and

(Continued on following page)

Reust and APC appealed. We held on appeal that (1) the provisions of AS 09.17.020 awarding fifty percent of punitive damages to the State and capping punitive damages are constitutional; (2) the State was properly permitted to intervene; (3) Reust's award of lost wages should be limited to three years after termination, rather than ten as the jury determined; and (4) the cap provisions of subsection .020(f) rather than (h) should have been used.[4] We remanded the case to the superior court with instructions to reduce the lost wages award to three years, to apply the punitive damages cap expressed in subsection .020(f), and to consider whether the recalculated punitive award would be excessive.[5]

After our opinion was published, Reust and APC entered into a settlement agreement. Under the agreement APC paid Reust $1 million[6] in exchange for a release of all claims. Reust agreed to defend and

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(4) $500,000 if the employer has 500 or more employees in this state.

. . . .

(j) If a person receives an award of punitive damages, the court shall require that 50 percent of the award be deposited into the general fund of the state. This subsection does not grant the state the right to file or join a civil action to recover punitive damages.

[4] *See Reust I*, 127 P.3d at 817-18, 820-25.

[5] *Id.* at 826.

[6] The parties did not purport to allocate this sum between punitive and compensatory damages.

indemnify APC from any claims by the State for punitive damages, and agreed to place $200,000 of the settlement proceeds in the court registry so those proceeds would be available should the State assert any claim it might have for punitive damages. Reust and APC then filed a stipulation for dismissal in the superior court. The State objected to dismissal, noting that it was a party to the action, that it had not agreed to the stipulation or the settlement, and that it had not received its share of punitive damages.

The superior court refused to dismiss the case. In making this ruling the superior court summarized Reust's position that the State should receive nothing as follows: "he argues that the case is in the same posture as it would have been if the parties settled before the jury delivered its verdict." The court rejected this argument, stating that

> [a]llowing plaintiffs to avoid dividing punitive awards with the State by negotiating a post-verdict settlement would frustrate the purpose of AS 09.17.020(j). The State gained an interest when the verdict awarding punitive damages was published. The Supreme Court's remand to determine the amount of punitive damages does not eliminate the interest.

After additional briefing, the superior court calculated punitive damages under the subsection

.020(f)(1) cap to be $716,525.52,[7] determined that this amount would not be excessive, and ordered that half of this amount be paid to the State after adjustments for a pro rata portion of Reust's counsel's fees expended in obtaining the award. Subsequently, the court entered a final judgment granting the State $207,792.40 as its net share of punitive damages to be recovered "against Alaska Petroleum Contractors (or plaintiff pursuant to the plaintiff and defendant's settlement agreement)."

Reust appeals from this judgment.

He contends that the State has no interest in a punitive damages award until a formal judgment is entered, rather than, as the superior court held, when a verdict is returned. Reust also argues that once this court reversed the punitive damages judgment, the State no longer had an interest in the settlement proceeds. We address these issues in turn.

### A. The State's Interest in a Punitive Damages Award Attaches when a Verdict Is Returned.

The first sentence of AS 09.17.020(j) grants the State a right to fifty percent of any punitive damages "award," and the second sentence provides that the

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[7] The subsection .020(f)(1) cap is three times compensatory damages. The superior court computed compensatory damages as required in *Reust I* to be $238,841.84.

subsection "does not grant the state the right to file or join a civil action to recover punitive damages." Taken as a whole, this subsection is most sensibly interpreted to mean that before a verdict is returned, the State may not intervene in a claim seeking punitive damages; however, once a verdict for punitive damages is returned, the State's interest in punitive damages comes into existence and the State may intervene to protect this interest. A number of reasons support this reading.

Variations of the word "award" are used throughout AS 09.17.020 to refer to a verdict[8] or to a verdict as adjusted by a cap on damages.[9] Thus, in subsection .020(j) the phrase "[i]f a person receives an award of punitive damages" refers to the receipt of a verdict and any adjustment of it necessitated by one of the cap subsections, and not to receipt of a

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[8] *See* for example, AS 09.17.020(a): "If punitive damages are allowed, a separate proceeding under (c) of this section shall be conducted before the same fact finder to determine the amount of punitive damages to be awarded." (Emphasis added.) *See also* subsection .020(b): "The fact finder may make an award of punitive damages only if the plaintiff proves by clear and convincing evidence that the defendant's conduct (1) was outrageous, including acts done with malice or bad motives; or (2) evidenced reckless indifference to the interest of another person." (Emphasis added.)

[9] *See* subsection .020(f): "Except as provided in (g) and (h) of this section, an award of punitive damages may not exceed the greater of (1) three times the amount of compensatory damages awarded to the plaintiff in the action; or (2) the sum of $500,000." (Emphasis added.)

judgment nor, as Reust also suggests, receipt of money paid pursuant to a judgment.

We stated in *Reust I*: "[I]t appears that the state should always be permitted to intervene when there is any dispute about how a punitive damages award is to be allocated."[10] Because this observation was made in the context of an intervention request that was made before a judgment was entered, it supports the conclusion we reach today.

It is hard to think that any other rule would make sense. If by the device of a post-verdict settlement a plaintiff could eliminate the need to recognize the State's interest in punitive damages, such settlements would almost always be accomplished and the State would almost never receive its share of punitive damages. The interpretation advocated by Reust would, in other words, make subsection .020(j) nearly meaningless. In *Reust I* we indicated that the purposes of subsection .020(j) were to reduce the incentive for plaintiffs to pursue punitive damages claims and encourage pretrial settlements, "since the state only shares in punitive damages when an award is made."[11] We also took note of the purpose of

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[10] *Reust I*, 127 P.3d at 825.

[11] *Id.* at 822 (quoting *Anderson v. State ex rel. Cent. Bering Sea Fishermen's Ass'n* (*Anderson II*), 78 P.3d 710, 717 (Alaska 2003) (Matthews, J., dispositional plurality opinion)). In *Reust I* we stated:

> [A]llocating half of all punitive damage awards to the state will reduce the incentive for plaintiffs to pursue

(Continued on following page)

"[i]ncreasing state revenues by allocating a portion of punitive damages awards to the state based on the analogy between such awards and civil and criminal fines" that underlies subsection .020(j).[12] These purposes would be frustrated, rather than achieved, if we were to adopt Reust's position.

## B. The State's Interest in the Punitive Damages Award Was Not Eliminated by *Reust I*.

Did our decision in *Reust I* return this case to its pre-verdict status in which Reust would be free to settle without any need to recognize the State's interest? We answer in the negative for the following reasons.

Our decision did not reverse the jury's determination that punitive damages should be awarded;

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> punitive damages claims. The statute will also encourage plaintiffs to settle their cases since the state only shares in punitive damages when an award is made. These incentives could reduce both the overall number of punitive damage claims as well as the number of punitive damage claims that actually go to trial. This effect could reasonably be expected to have a moderating influence on liability insurance premiums. Further, the incentive to settle punitive damage claims could reduce the length and complexity of litigation, thereby reducing the overall cost of litigation.

*Id.* (quoting *Anderson II*, 78 P.3d at 717) (alteration in original).

[12] *Id.* (quoting *Anderson II*, 78 P.3d at 718) (alteration in original).

nor did it require a new jury determination as to what the amount of punitive damages should be. Instead, we required that the applicable cap on punitive damages be calculated.[13] This calculation entailed the use of the formula set out in subsection .020(f)(1) – three times the award of compensatory damages.[14] Our remand also required the recalculation of compensatory damages.[15] But this too was accomplished based on the initial verdict without the need for a new trial.[16] Because no new trial was required, the State's interest that attached when the verdict was announced remained in effect. It follows that Reust could not eliminate the State's interest by settling with APC.[17]

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[13] *See id.* at 824-26.

[14] *Id.*

[15] *Id.* at 826.

[16] Whether a new trial on punitive damages was required is important because of the purposes of subsection .020(j). The need for a new trial would mean that the subsection .020(j) incentives to settle without a trial could still meaningfully operate and potentially achieve significant savings for the parties and the court system. But as no new trial was required, the incentives could no longer operate.

[17] Reust also argues that awarding a share of punitive damages to the State is an unconstitutional taking of his property, in violation of the takings clauses of the federal and state constitutions, and also violates his due process rights secured under the federal and state constitutions. Both these claims have already been decided in *Reust I*. No comprehensible new claims based on the facts following remand have been asserted.

### C. Post-Judgment Interest and Cost Adjustments.

Reust's final point on appeal is that post-judgment interest should be set at the rate of interest that was in effect at the time of the first judgment, 4.25%, rather than the rate on judgments when the judgment after remand was issued, 9.25%. This argument is based on Appellant Rule 509, which provides:

> If a judgment for money in a civil case is affirmed, interest at the rate prescribed by law shall be payable from the effective date of the judgment of the trial court. If in a civil case a judgment is modified or reversed with directions that a judgment for money be issued by the trial court, interest on the new judgment at the rate prescribed by law shall be payable from the effective date of the prior judgment which was modified or reversed.

Reust's point is well taken and the State concedes it. The State also suggests that in light of our decision in *State v. Carpenter*,[18] a pro rata share of Reust's costs, in addition to attorney's fees, should have been deducted from the State's share of punitive damages. We agree. As we held in *Carpenter*, "[i]n order to ensure that the state is not unjustly enriched at the expense of litigants, we read AS 09.60.080 to

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[18] 171 P.3d 41 (Alaska 2007).

require a pro rata deduction of costs from the state's share of the punitive damages award."[19]

For the above reasons, we conclude that this case should be remanded to the superior court with instructions to modify the judgment by changing the post-judgment rate of interest on the judgment to 4.25% and by deducting Reust's pro rata share of costs attributable to the State's portion of the award. Except for these changes, the judgment should be affirmed.

AFFIRMED in part and REMANDED for modification.

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[19] *Id.* at 70.

**DAN K. REUST, Appellant/Cross-Appellee,**
**v.**
**ALASKA PETROLEUM CONTRACTORS, INC., Appellee/Cross-Appellant,**
**and**
**State of Alaska, Intervenor.**

**Supreme Court Nos. S-10910/S-10919, No. 5951**

**SUPREME COURT OF ALASKA**

***127 P.3d 807; 2005 Alas. LEXIS 147; 23 I.E.R. Cas. (BNA) 1065; 151 Lab. Cas. (CCH) P60,089***

**October 28, 2005, Decided**

**PRIOR HISTORY:** Appeal from the Superior Court of the State of Alaska, Third Judicial District, Kenai, Jonathan H. Link, Judge. Superior Court No. 3KN-99-132 CI.

**COUNSEL:** Arthur S. Robinson and Eric Derleth, Robinson & Associates, Soldotna, for Appellant/Cross-Appellee.

Douglas S. Parker, Preston Gates & Ellis, LLP, Anchorage, for Appellee/Cross-Appellant.

Jason T. Mogel and Christopher M. Kennedy, Assistant Attorneys General, Anchorage, and Gregg D. Renkes, Attorney General, Juneau, for Intervenor State of Alaska.

**JUDGES:** Before: Bryner, Chief Justice, Matthews, Eastaugh, Fabe, and Carpeneti, Justices. BRYNER,

Chief Justice, with whom CARPENETI, Justice, joins, dissenting in part.

**OPINOIN BY:** EASTAUGH

## OPINION

EASTAUGH, Justice.

### I. INTRODUCTION

A jury awarded Dan Reust compensatory and punitive damages after finding that Alaska Petroleum Contractors (APC) wrongfully terminated him in retaliation for testifying in previous litigation between APC and another former APC employee. APC and Reust both appeal.

As to the jury instructions to which APC preserved its objections, we discern no reversible error. We also hold that witness retaliation is against the public policy of this state, that APC failed to preserve its arguments against the emotional distress award, and that sufficient evidence supported an award of punitive damages. But because no reasonable jury could have found that the likely duration of Reust's employment would exceed three years, we remand for reduction of the lost wages awards. We reject Reust's challenges to the constitutionality of the statutes capping punitive damages awards and allocating half of such awards to the state and hold that the superior court did not err in allowing the State of Alaska to intervene, or in the timing of entry of judgment. But because the court applied the wrong punitive

damages cap, we also remand for application of the correct cap.

## II. FACTS AND PROCEEDINGS

Dan Reust sued Alaska Petroleum Contractors for wrongful termination, claiming his discharge violated the public policy of protecting witnesses. APC contends on appeal that Reust was never actually hired. We view the evidence in the light most favorable to Reust as the party who prevailed at trial.[1]

In April 1998 APC invited Dan Reust to interview for a project manager position. It had intermittently employed Reust in the past. Reust testified at trial that at the conclusion of the interview with APC manager Todd Pizzuto he was offered the job and was given a "hire packet" to complete. Reust returned the completed packet the next day, and Pizzuto asked him to report to the field the following morning. Reust testified that he believed he had been hired when he returned the hire packet. Pizzuto, however, testified that he never offered Reust a job, did not hire him (and did not have the authority to do so), and did not give him a hire packet.

The evening before Reust was to report to the field he received a telephone message from Pizzuto that instructed him to instead meet with Pizzuto the next day. Reust testified that at that meeting he was

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[1] *See, e.g., Riddell v. Edwards*, 32 P.3d 4, 8 (Alaska 2001).

informed that he was, in his words, being "let go" due to his participation in previous litigation between APC and another former employee. Reust had testified adversely to APC in a 1997 deposition in litigation brought by Richard Jantz.

Pizzuto testified that he did not "recall" whether he told Reust that the *Jantz* lawsuit was the basis for APC's decision. According to the testimony of Michael Bailey, Pizzuto's superior, it was Bailey who made the adverse decision regarding Reust, and Bailey's decision was based on a conversation Bailey had had with Gary Buchanan in which Buchanan (according to Bailey) stated that Reust was "badmouthing" APC. At trial, however, Buchanan denied making this statement and asserted that he did not even know Reust.

The trial jury found for Reust, finding that he had been hired by APC and that it subsequently terminated him unlawfully. The jury awarded Reust damages of $132,200 for past wage loss, $156,800 for future wage loss, and $100,000 for non-economic losses for "emotional distress, mental anguish and anxiety." It also found that Reust was entitled to recover punitive damages.

Following the second phase of the trial, the jury awarded Reust punitive damages of $4.3 million. After Superior Court Judge Jonathan H. Link permitted the State of Alaska to intervene, Reust moved

to have parts of the Alaska tort reform legislation[2] declared unconstitutional. Judge Link denied Reust's motion, reduced the punitive damages award to $500,000 per AS 09.17.020(h), and directed that fifty percent of the award be allocated to the state under AS 09.17.020(j).

APC and Reust appeal.

## III. DISCUSSION

### A. Contract Formation Issues

#### 1. There was no reversible error in the failure to explicitly instruct the jury that consideration is an element of contract formation.

The superior court gave the jury the following instruction concerning contract formation:

> In order to find that an employment contract existed between Dan Reust and APC in April of 1998 you must find that each of the following propositions is more likely true than not true: (1) that APC made an offer of employment encompassing the essential terms of employment, (2) that Dan Reust agreed to the essential terms of employment offered by APC and accepted APC's offer of employment, and (3) that both parties intended to be bound by the offer and acceptance.

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[2] Ch. 26, SLA 1997.

APC argues that the instruction failed to include the necessary element of consideration.[3] It apparently urges us to reverse the jury's contract formation findings, contending that the jury could not have found that Reust accepted the offer and supplied return consideration because he did not actually commence work. APC's view is dependent on its conception of at-will employment as a form of unilateral contract. Reust responds that by returning the completed "hire packet" and thereby promising to work for APC, he accepted the offer and provided sufficient consideration; the jury instruction was therefore correct.[4]

"Whether a jury instruction is erroneous is a question of law to which we apply our independent judgment." *Era Aviation, Inc. v. Lindfors*, 17 P.3d 40, 43 n.2 (Alaska 2000).

We do not need to resolve this instructional dispute because any possible error was harmless. Even if the instruction's failure to explicitly list the

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[3] *See, e.g., Childs v. Kalgin Island Lodge*, 779 P.2d 310, 314 (Alaska 1989) ("The formation of an express contract requires an offer encompassing its essential terms, an unequivocal acceptance of the terms by the offeree, consideration and an intent to be bound."); *see also Magill v. Nelbro Packing Co.*, 43 P.3d 140, 142 (Alaska 2001).

[4] *See* RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981) ("To constitute consideration, a performance or a return promise must be bargained for . . . A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.").

element of consideration tainted the jury's finding that APC hired Reust, it would not have affected the jury's preliminary finding that APC had offered Reust a position. Similarly, it would not have affected the jury's finding that APC's decision to terminate (or per APC's view, "not to hire") was motivated by Reust's participation in the *Jantz* litigation. For reasons we discuss in Part III.B.1, such retaliatory conduct violates public policy in Alaska. Therefore, any possible instructional error regarding contract formation would not have affected the finding that APC made Reust an employment offer and then withdrew it for an illegal reason. In effect, APC is relying on the fact Reust never actually started work, a circumstance caused by APC's illegal conduct in preventing him from commencing work.

APC conceded at oral argument on appeal that, under its view, a wrongfully terminated employee fired after one minute on the job would have a claim but the same employee would have no recourse if termination occurred one minute before work was to begin. We fail to see any value in this distinction and note that at least one other court has ruled that public policy violations can sustain an at-will employee's cause of action even if work was never actually commenced.[5] Moreover, the contract law

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[5] In *Hackett v. Foodmaker, Inc.*, 69 Mich. App. 591, 245 N.W.2d 140, 140-41 (Mich. App. 1976), the plaintiff agreed to move from California to Michigan to become a restaurant manager. The restaurant was not yet open when the plaintiff

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principle of prevention supports our conclusion.[6] APC was free to withdraw its at-will employment offer for a legitimate reason but cannot now rely on Reust's lack of performance caused by APC's own illegal conduct as a shield against liability.

The *Hackett* court ruled that these circumstances amounted to a "distinguishing feature" and an exception to the "proposition that contracts for personal services for permanent employment or for life are considered indefinite hirings, terminable at the will of either party." *Id.* The court allowed the claim to proceed because the "plaintiff was never afforded an opportunity to perform under the contract due to

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arrived in Michigan, so he filled in for absent managers in other locations until his restaurant was ready. *Id.* at 141. In the meantime plaintiff became involved in an anti-trust suit against defendant and was then informed that anyone involved in such a lawsuit would not be considered for a restaurant manager position. *Id.* Another person was later selected to fill the plaintiff's expected position. *Id.*

[6] *See, e.g., Indus. Uranium Co. v. United States*, 180 Ct. Cl. 50, 376 F.2d 868, 872 (Ct. Cl. 1967) ("The defendant [who] prevented performance of the alleged condition[ ] cannot now stand on it as a bar to recovery."); *Motel Serv., Inc. v. Cent. Maine Power Co.*, 394 A.2d 786, 788 (Me. 1978) ("Where the offeree of a unilateral contract is prevented from completing performance by the actions of the offeror, such failure will not be a defense to an action by the offeree on the contract."); *Cahoon v. Cahoon*, 641 P.2d 140, 144 (Utah 1982) ("One party cannot by willful act or omission make it impossible or difficult for the other to perform and then invoke the other's nonperformance as a defense."); RICHARD A. LORD, WILLISTON ON CONTRACTS § 39:3, at 519 (4th ed. 2000).

defendant's total repudiation thereof in that defendant never allowed plaintiff an opportunity to manage [the restaurant]." *Id.*

Later Michigan decisions addressing *Hackett* have advanced conflicting views over what factors the *Hackett* court found dispositive, but none has criticized its conclusion that a public policy violation can permit a cause of action before performance has commenced. *See Cunningham v. 4-D Tool Co.*, 182 Mich. App. 99, 451 N.W.2d 514, 515-516 (1989); *Filcek v. Norris-Schmid, Inc.*, 156 Mich. App. 80, 401 N.W.2d 318, 319-20 (Mich. App. 1986); *Milligan v. Union Corp.*, 87 Mich. App. 179, 274 N.W.2d 10, 12 n.3 (Mich. App. 1978).

Accordingly, APC would still be liable even if it were necessary for Reust to have actually commenced work in order to accept the offer and supply consideration. We therefore perceive no reversible error because APC has not demonstrated that the failure to instruct on the consideration element was prejudicial.

### B. Reust's Claim of Public Policy Violation

APC contends that "if a public policy against witness retaliation is to be adopted in Alaska as a basis for a wrongful discharge tort, it should not extend to those instances where an individual has testified falsely or with a reckless disregard for whether his testimony is true or false." Before

turning to APC's truthfulness argument, we first address whether the State of Alaska has an explicit public policy against witness retaliation.

### 1. Witness retaliation is against the public policy of Alaska.

In *Kinzel v. Discovery Drilling, Inc.*, we recognized that "a retaliatory discharge in violation of an explicit public policy gives rise to a tort as well as a contract claim."[7] We concluded that the State of Alaska has explicit public policies that protect employees who make workers' compensation claims and who serve as whistleblowers.[8]

Several Alaska statutes demonstrate that the state also has an explicit policy of protecting witnesses from retaliation. This protective policy is most clearly stated in AS 11.56.510, which makes it a crime to retaliate against a witness by using force, damaging property, or making threats.[9] Other statutes

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[7] *Kinzel v. Discovery Drilling, Inc.*, 93 P.3d 427, 432 (Alaska 2004).

[8] *Id.* at 438.

[9] AS 11.56.510 provides, in part:

> (a) A person commits the crime of interference with official proceedings if the person (1) uses force on anyone, damages the property of anyone, or threatens anyone with intent to (A) improperly influence a witness or otherwise influence the testimony of a witness; (B) influence a juror's vote, opinion, decision, or other action as a juror; (C) *retaliate against a witness or juror because of participation by the witness*

(Continued on following page)

contain witness protection provisions, including the Alaska Occupational Safety and Health Act,[10] the Alaska Human Rights Law,[11] and the Alaska Assisted Living Homes Act.[12] Through these laws, the state has clearly stated a public policy of protecting witnesses from retaliation. Even though APC's alleged conduct probably does not violate the letter of any of these laws,[13] its actions are contrary to the policy reflected

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*or juror in an official proceeding*; or (D) otherwise affect the outcome of an official proceeding. . . . (Emphasis added.)

[10] AS 18.60.089(a) provides: "A person may not discharge or discriminate against an employee because the employee has . . . testified or is expected to testify in a proceeding relating to occupational safety and health. . . ."

[11] AS 18.80.220(a) provides: "It is unlawful for . . . (4) an employer . . . to discharge, expel, or otherwise discriminate against a person because the person has . . . filed a complaint, testified, or assisted in a proceeding under this chapter. . . ."

[12] AS 47.33.350(a) provides: "An assisted living home may not take retaliatory action against a resident of that home if the resident or the resident's representative . . . (2) appears as a witness, or refuses to appear as a witness, in an adjudicatory proceeding regarding the home. . . ."

[13] If, for instance, Reust had been fired for testifying in a proceeding under the Alaska Human Rights Act (AHRA), we would be reluctant to recognize a cause of action in this case. The AHRA provides its own cause of action, AS 22.10.020(i), and we have typically declined to recognize independent torts based on contravention of public policy where there are adequate legal alternatives. *See, e.g., Walt v. State*, 751 P.2d 1345, 1353 n.16 (Alaska 1988) (refusing to recognize independent tort for violation of public policy where statutes and collective bargaining agreement provided comprehensive scheme for employee rights and remedies).

in the statutes. Thus, we hold that there is an actionable public policy tort in Alaska for retaliation against witnesses in legal proceedings.

In reaching this conclusion, we are persuaded by cases from other jurisdictions that have held various forms of witness retaliation to be contrary to public policy.[14] For example, in *Page v. Columbia Natural Resources, Inc.*, the West Virginia Supreme Court held that "it is against substantial public policy of West Virginia to discharge an at-will employee because such employee has given or may be called to

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[14] *See, e.g., Bishop v. Fed. Intermediate Credit Bank of Wichita*, 908 F.2d 658, 662 (10th Cir. 1990) ("Recognition of the [witness retaliation] exception supports our tradition of free, direct and truthful testimony at legislative hearings, a policy Oklahoma has implicitly recognized."); *Freeman v. McKellar*, 795 F. Supp. 733, 742 (E.D. Pa. 1992) (holding that Pennsylvania law "reflects a sufficiently clear and significant public policy" against witness retaliation); *Fitzgerald v. Salsbury Chem., Inc.*, 613 N.W.2d 275, 286 (Iowa 2000) ("We find ample statutory support for a public policy in Iowa in favor of refusing to commit perjury. . . . This public policy is not simply confined to the refusal to commit perjury but clearly embraces a broader public policy to provide truthful testimony in legal proceedings.") (internal citation omitted); *Ressler v. Humane Soc'y of Grand Forks*, 480 N.W.2d 429, 432 (N.D. 1992) ("[T]he public policy of North Dakota prohibits an employer from discharging an employee for honoring a subpoena and for testifying truthfully."); *Sabo v. Schott*, 70 Ohio St. 3d 527, 1994 Ohio 249, 639 N.E.2d 783 (1994) ("Plaintiff's allegation that he was fired as a result of having testified truthfully, albeit unfavorably to the defendants, if proven to be true, would constitute conduct on the part of the defendants which violates the public policy of this state.").

give truthful testimony in a legal action."[15] The court found support for this policy in state laws prohibiting "wilful perjury and false swearing[ ] or procuring another to do so" and prohibiting "intimidating or impeding any witness[ ] or attempting to obstruct or impede the administration of justice in any court."[16]

Allowing a tort remedy under these circumstances also furthers the state's interest in maintaining an effective method of judicial dispute resolution. Subjecting employers to tort liability for retaliating against employees who testify in legal proceedings dissuades retaliatory conduct. It also reduces the temptation for employees, fearing adverse responses from their employers, to provide false testimony or disobey a subpoena.[17]

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[15] *Page v. Columbia Natural Res., Inc.*, 198 W. Va. 378, 480 S.E.2d 817, 826 (W. Va. 1996).

[16] *Id.* at 825.

[17] *See* AS 11.56.200 (crime of perjury); AS 09.20.120 ("A witness who disobeys a subpoena served on the witness shall also forfeit to the party requiring the attendance of the witness the sum of $50 and all damages which that party may sustain by the failure of the witness to attend."); Alaska R. Civ. P. 45(f) ("Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued.").

### 2. A "truthfulness" instruction was not required under these facts, and it is unlikely APC preserved the issue for appeal.

APC argues that if witness retaliation is contrary to Alaska's public policy, the jury should have been instructed that only "truthful" testimony can be protected.[18] It therefore asserts that the failure to instruct the jury on this requirement is reversible error because it "deprived APC of a critical defense." But, as Reust points out, APC never asserted that it terminated Reust because he testified falsely. In *Page*, the West Virginia Supreme Court addressed this same argument:

> Appellants argue additionally that Plaintiff's Instruction No. 3 failed to require that the testimony be truthful. While the failure to testify truthfully may present an occasion for further instruction in such cases, we find that appellants were not prejudiced by this omission, since there is no allegation that [the plaintiff] was terminated because her testimony was not truthful.[19]

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[18] Jury Instruction No. 26 stated in part: "It is unlawful to fire an employee for giving testimony, including a deposition, in a legal proceeding, or for the possibility that he may have been a witness in the future in the same lawsuit, because this is a violation of a substantial public policy."

[19] *Page*, 480 S.E.2d at 826 n.8.

We agree with this reasoning. Because APC did not offer evidence at trial that Reust's alleged lack of truthfulness when he testified in the *Jantz* matter was the reason for his termination, APC was not entitled to such an instruction.

We also observe that it is unlikely APC preserved this issue.[20] APC claims that the truthfulness requirement was discussed with the superior court during an unrecorded session that dealt with instructions; it points to circumstances supporting that contention, but it fails to establish where it raised the truthfulness issue on the record.[21] As a result, it is impossible for us to decide whether APC adequately brought the issue to the superior court's attention. Such problems must be avoided by conducting all jury instruction sessions on the record. Our disapproval of off-the-record instructional discussions is long-standing.[22] The lack of a record prevents or

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[20] Alaska Rule of Civil Procedure 51(a) provides in part: "No party may assign as error the giving or the failure to give an instruction unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which the party objects and the grounds of the objection." APC's appellate counsel was not its trial counsel.

[21] *See* Alaska R. App. P. 212(c)(8)(B) ("Appellant's brief shall indicate the pages of the record where each point on appeal was raised in the trial court."); *Pope v. State*, 480 P.2d 697, 698 (Alaska 1971) ("[B]asic fairness to all parties to an appeal requires that we limit our review to matters appearing in the record.").

[22] *See City of Nome v. Atlak*, 570 P.2d 162, 166 n.4 (Alaska 1977) ("We disapprove of off-the-record discussions between

(Continued on following page)

discourages adequate appellate review. It may prevent an appellant from establishing that a meritorious objection was made. And it may also prevent us from understanding precisely what objection was made and the reasoning of the lower court. Because the objections actually made at trial often differ in subtle but material ways from the objections appellants argue on appeal, the lack of a record may also hamper our ability to affirm a judgment. Likewise, the lack of a record of the trial court's reasoning might deny us an opportunity to be persuaded by the court's own words or the circumstances the court relied on in ruling.

*State v. Laraby*, 842 P.2d 1275 (Alaska App. 1992), provides a poignant example of the unnecessary confusion that can result from unrecorded jury instruction sessions. *Laraby* concerned ineffective assistance of counsel; specifically, whether the defense attorney had withdrawn a proposed instruction

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court and counsel concerning jury instructions. Such a practice makes our job needlessly more difficult."); *State v. Abraham*, 566 P.2d 267, 269 (Alaska 1977) (noting that "extensive unrecorded in-chambers conferences . . . could have had potentially serious repercussions"); *State v. Buckalew*, 561 P.2d 289, 292 (Alaska 1977) ("The absence of a record presents grave problems when it becomes necessary . . . to reconstruct the events that occurred in the court below."); *Ervin v. State*, 761 P.2d 124, 126 n.2 (Alaska App. 1988) (quoting *Ailak*, 570 P.2d at 166 n.4). We also note that Alaska Administrative Rule 21 provides: "So far as practicable, all judicial business involving the trial of causes and conferences with members of the Bar or litigants shall be on the record and transacted in open court."

for tactical reasons. *Id.* at 1279. In a post-conviction evidentiary hearing, the trial judge testified as a witness regarding an off-the-record jury instruction session but "could not recall whether defense counsel had withdrawn any proposed instructions" and "could not explain why the [instruction in question] had not been given." *Id.* at 1277.

### C. Mixed-Motive Instruction

#### 1. The jury instruction on APC's motivation was not reversible error.

The jury was instructed that

> [i]n order to prove his claim for wrongful discharge Dan Reust must prove it more likely true than not true that . . . there was a causal connection between Dan Reust having testified, or the fact that he might testify in the future, and the actions APC took. A causal connection is established if the testimony Dan Reust gave was a noteworthy or motivating factor in the decision APC made. It need not have been the only factor or reason.

At trial, APC unsuccessfully requested that the following phrase be added to the last sentence of the instruction: "but the decision would not have occurred without that factor or reason." On appeal, APC argues that it was error not to include the requested phrase. We conclude that APC did not adequately preserve the issue it argues on appeal and that there was no reversible error.

Under Alaska law, retaliatory discharge claims can follow different analytical frameworks depending on the type of evidence presented. When there is no "direct evidence" of retaliation, a pretext framework is used.[23] Under this analysis, the employee must first establish a prima facie case.[24] If the employee clears this hurdle, the burden of production "shifts to the employer to articulate a legitimate nonretaliatory explanation for the discharge."[25] If the employer does so successfully, the burden reverts to the employee, who must prove that the explanation was a pretext for retaliation.[26]

But "in cases where there *is* direct evidence of discrimination, we instead apply a mixed-motive analysis. . . ."[27] Here the plaintiff need only show that

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[23] *VECO, Inc. v. Rosebrock*, 970 P.2d 906, 918-19 (Alaska 1999). Direct evidence is "evidence of conduct or statements by persons involved in the decisionmaking process that may be viewed as directly reflecting the alleged discriminatory attitude . . . sufficient to permit a factfinder to infer that that attitude was more likely than not a motivating factor in the employer's decision. . . ." *Kinzel v. Discovery Drilling, Inc.*, 93 P.3d 427, 435 (Alaska 2004) (quoting *Ostrowski v. Atlantic Mut. Ins. Cos.*, 968 F.2d 171, 182-83 (2d Cir. 1992)).

[24] To establish a prima facie case of retaliatory discharge, "a plaintiff must show: (1) that [the employee] was engaged in a protected activity; (2) that an adverse employment decision was made; and (3) that there was a causal connection between the two." *Kinzel*, 93 P.3d at 433 (quoting *VECO*, 970 P.2d at 921).

[25] *Kinzel*, 93 P.3d at 433.

[26] *Id.*

[27] *Era Aviation, Inc. v. Lindfors*, 17 P.3d 40, 44 (Alaska 2000) (emphasis added).

a "prohibited reason" was a motivating factor.[28] Then "[t]he employer must show that it would have made the same decision even absent considerations of [the impermissible factor]."[29] Accordingly, if the plaintiff employee presents direct evidence of discrimination or retaliation sufficient to permit an inference that such factors were motivating factors, "the jury should be instructed that if it does draw that inference the plaintiff is entitled to recover unless the employer has established by a preponderance of the evidence that the employer would have taken the same action without consideration of the impermissible factor."[30]

The jury instruction in this case can best be described as a partial mixed-motive instruction. It correctly stated that Reust was required to show that an impermissible factor (i.e., his act of testifying in *Jantz*) was a motivating factor for APC's conduct; however, the instruction failed to inform the jury that Reust should not prevail if APC established that it would have made the same decision without consideration of the impermissible factor. APC recognized that something was missing from the instruction, but its requested language ("but that decision would not have occurred without that factor or reason") would have misapplied the burden. It would have required *Reust* to prove that his participation as a witness in

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[28] *Kinzel*, 93 P.3d at 434.

[29] *Lindfors*, 17 P.3d at 44 (citing *VECO*, 970 P.2d at 920).

[30] *Kinzel*, 93 P.3d at 435 (quoting *Ostrowski*, 968 F.2d at 182-83) (emphasis added).

*Jantz* was a determinative factor. As we noted above, an employee who has presented direct evidence of retaliation does not have this burden under the mixed-motive framework. There was direct evidence of an improper motive here. Reust testified that Pizzuto, an APC manager, informed him that APC's decision was due to Reust's involvement in the *Jantz* lawsuit.

At trial APC argued that Reust was not entitled to a mixed-motive instruction because he had not pleaded such a theory and because he maintained that APC's decision was based *solely* on his involvement in the *Jantz* lawsuit. Thus, according to APC, Reust was not entitled to a mixed-motive instruction because he had not argued in the alternative that his prior testimony was merely a "motivating factor." But the mixed-motive framework applies if "the evidence is sufficient to allow a trier to find both forbidden and permissible motives";[31] this threshold is satisfied if the plaintiff introduces direct evidence of an impermissible factor. It does not require the plaintiff to plead that the defendant's conduct was based on a combination of factors instead of a single impermissible factor.[32]

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[31] *Ostrowski*, 968 F.2d at 181.

[32] *See, e.g., VECO*, 970 P.2d at 920 (rejecting defendant's "argument that the plaintiff must choose between pursuing a mixed-motive theory and a pretext theory").

APC might have asserted that there was insufficient direct evidence to warrant a mixed-motive instruction. Had that argument not succeeded, APC should have asked that the instruction include additional language that would also have made it clear that APC had the burden of showing that it would have made the same decision based on legitimate reasons standing alone. But APC did not request such language, and the language it proposed would have erroneously shifted the burden back to Reust. Given Reust's repeated and correct observations that it was APC's burden to show that a legitimate reason alone would have produced the same decision, APC was on notice that the instructional change it sought contained a grave flaw.

A party arguing instructional error must demonstrate that the grounds were properly raised.[33] To the extent APC objected to giving a mixed-motive instruction instead of a pretext instruction, we conclude that no error occurred. To the extent APC objected to the incompleteness of the mixed-motive instruction, we conclude that APC did not distinctly raise this issue at trial. Its failure to offer proposed language that would have correctly allocated the burden of proof means that APC did not provide the superior court with an "identifiable opportunity to rule" on the issue

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[33] *See* Alaska R. Civ. P. 51(a), quoted in *supra* note 20.

it now raises.[34] We therefore review the instruction "only for plain error which occurs if a correct instruction would have likely altered the result."[35]

Although it is conceivable the jury might have reached a different result had a complete mixed-motive instruction been given, we cannot conclude that a different result would have been likely. For instance, if we assume that the jury disbelieved the testimony of Gary Buchanan and accepted APC's "badmouthing" rationale, had a proper instruction been given, the jury might have found that the "badmouthing" would have produced the same decision even absent Reust's participation in the *Jantz* lawsuit. But this scenario requires too much speculation about the jury's findings for us to conclude that a correct instruction would likely have altered the result.

### D. Lost Wages Awards

#### 1. The likely period of employment could not reasonably have exceeded three years.

The jury awarded past wage loss for nearly three years – from the date APC wrongfully terminated

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[34] *Manes v. Coats*, 941 P.2d 120, 125 n.4 (Alaska 1997) (quoting *Conam Alaska v. Bell Lavalin*, 842 P.2d 148, 153 (Alaska 1992)).

[35] *Id.* at 125 (quoting *Conam Alaska*, 842 P.2d at 153) (internal quotation marks omitted).

Reust in April 1998 to the beginning of the trial on January 2, 2001. The jury also found that "the length of Dan Reust's future wage loss" was seven years. The jury thus awarded Reust lost wages for a total of about ten years. APC argues that a wage-loss award for a ten-year period was excessive, speculative, and not supported by the record.

Viewed, as it must be, in the light most favorable to Reust,[36] the trial evidence nonetheless does not support a conclusion that Reust would have worked for APC continuously for ten years. APC manager Mike Bailey testified that APC project managers typically work one to three years. There was evidence that employment tenure in the construction industry is uncertain; a witness, when asked how long he would have been in a certain job, testified that there was "no telling with construction work." Moreover, Reust's own employment history, including previous stints with APC, undermines the likelihood of a ten-year tenure. Reust testified that he worked for APC on "several different occasions" and his resume indicates that APC employed him at Prudhoe Bay from 1992 to 1995 and at Milne Point from 1995 to 1996.

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[36] "The adequacy of evidence supporting a jury's award is a mixed question of law and fact." *Cent. Bering Sea Fishermen's Ass'n v. Anderson* (*Anderson I*), 54 P.3d 271, 277 (Alaska 2002). "As such, we review the evidence presented in the light most favorable to [the prevailing party] and evaluate de novo the legal question of whether that evidence is specific enough to support the jury's economic damages award." *Id.*

Reust points to the testimony of Todd Pizzuto, another APC manager, who testified that Reust's position was not project-specific. This suggests that Reust could have been assigned to other projects once his initial assignment was finished. But Pizzuto also testified that that Reust's position could be terminated due to a reduction of force.[37] Reust's counsel suggested in closing argument that Reust would have worked for APC until retirement in 2014. This amounted to a request for about sixteen years of lost

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[37] Pizzuto testified as follows:

Q. Now, isn't it true, Mr. Pizzuto, that the person who was going to get to fill Mr. Peikert's position – whoever that person would have been – would have had that job as long as you did a good job for the company, subject to reduction in force, a transfer, in quitting, or whatever that person wanted to do?

A. Yeah, when – provided we have the work to justify all the positions.

Q. Right. Subject to reduction in force.

A. Yeah.

Q. But otherwise, they would have that job as long as they do a good job for the company, right?

A. As far as I know.

Q. And that particularly work for the project manager isn't a job – isn't project-specific, is it?

A. No.

Q. Okay. In other words, for that particular job, there was no particular project that needed to be completed, and then after it's completed, the person who had gotten the project manager's job, that job would be over and done with, right?

A. No.

wages. But the jury's award of lost wages for ten years implicitly rejected that claim.

We have stated that "[t]he normal rule is that a wrongfully discharged employee is entitled to the total amount of the agreed upon salary for the unexpired term of his employment [contract]. . . ."[38] For example, in *Central Bering Sea Fishermen's Ass'n v. Anderson* (*Anderson I*) we held that a wrongfully discharged employee's "lost earnings should be measured by the amount and duration of the contract that [he or] she expected to have with [the employer]," which in that case was one year.[39] In comparison, Reust had an at-will relationship of no specified term. We declined in *Kinzel* to rule "on what the appropriate measure of damages for lost wages would be for the tortious discharge of a whistleblower" because the issue was not fully briefed.[40] We now hold that when an at-will employee is wrongfully discharged, damages are appropriately measured by the likely duration of employment had the wrongful discharge not occurred.[41]

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[38] *Anderson I*, 54 P.3d at 278 (quoting *Skagway City Sch. Bd. v. Davis*, 543 P.2d 218, 225 (Alaska 1975)).

[39] *Anderson I*, 54 P.3d at 278.

[40] *Kinzel v. Discovery Drilling, Inc.*, 93 P.3d 427, 438 (Alaska 2004).

[41] *See, e.g., Tadsen v. Praegitzer Indus., Inc.*, 136 Or. App. 247, 902 P.2d 586, 590 (Or. App. 1995) ("the period that the plaintiff would likely have been employed by the defendant but for the discrimination. . . . is [ ] the proper ultimate question in

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The evidence in this case cannot support a finding of ten years as the likely duration of employment. The record reveals that Reust would have been employed for one to three years had APC's tortious conduct not intervened. Viewing the evidence in the light most favorable to Reust, no reasonable jury could find that the likely duration of employment would have exceeded three years. Therefore, we vacate the jury's lost wages awards and remand for entry of a revised judgment awarding lost wages for a period of three years.

### 2. The superior court did not abuse its discretion by excluding evidence that Reust's position had been eliminated.

APC contends that the superior court abused its discretion by excluding evidence that Reust's position had been eliminated in a corporate reorganization.[42] APC manager Mike Bailey testified at trial on direct examination by APC that he had been "advised" the very morning he took the witness stand that "the position has been eliminated." After Reust raised a hearsay objection, the superior court conducted a lengthy conference out of the jury's presence. Bailey proffered additional testimony during this session

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claims by at will employees. . . .") (affirmed by *Tadsen v. Praegitzer Indus., Inc.*, 324 Ore. 465, 928 P.2d 980 (Or. 1996)).

[42] "We review evidentiary rulings for abuse of discretion." *Zaverl v. Hanley*, 64 P.3d 809, 817 n.16 (Alaska 2003).

that he had been told by APC's president, in a telephone call that morning, that Reust's position had been eliminated.

APC, asserting here that the superior court excluded the testimony as a sanction for failure to disclose and not because it was hearsay, argues that the superior court "was first required to ascertain whether a continuance would have provided a reasonable alternative to exclusion." We do not need to address this argument because APC's starting premise – that the superior court excluded the disputed testimony to remedy a discovery violation – is incomplete. The superior court ruled the testimony was inadmissible hearsay, stating: "We're going to start with the proposition that that's hearsay, and I'm going to instruct the jury that that testimony is stricken." APC does not challenge this ruling on appeal, nor do we see any indication that such a challenge would have been successful.[43] As a result, we conclude that it was not an abuse of discretion to exclude Bailey's testimony that Reust's position had been eliminated.[44]

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[43] "Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Alaska R. Evid. 801(c). The testimony in question appears to fit this definition, and none of the exclusions or exceptions addressed in Alaska Evidence Rules 801(d), 803, or 804 seems to apply.

[44] The superior court did exclude, as an apparent sanction, other parts of Bailey's testimony. But the "position-elimination" testimony is the only passage that APC argues on appeal was

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### 3. APC has waived any argument that Reust's lost wages should be reduced due to "after-acquired" evidence.

APC argues in a footnote in its reply brief that it learned for the first time at trial that Reust had provided "reckless" testimony in the *Jantz* lawsuit. APC suggests that this "after-acquired evidence" would have caused APC to terminate Reust for legitimate reasons and therefore that his damages "arguably" should be limited to the date of the trial.[45] APC has waived this argument by first presenting it in its reply brief.[46]

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erroneously excluded; even if the court intended the sanction of exclusion to include the "position-elimination" testimony, the superior court's hearsay ruling was an alternative, independent, and unchallenged basis for exclusion. We "'may affirm a trial court's exclusion of evidence even though the affirmance is based on a ground not relied upon by the trial court.'" *Korean Air Lines Co., Ltd. v. State*, 779 P.2d 333, 339-40 (Alaska 1989) (quoting *Sloan v. Atlantic Richfield Co.*, 541 P.2d 717, 722 n.6 (Alaska 1975)).

[45] APC cites *Brogdon v. City of Klawock*, 930 P.2d 989, 992 (Alaska 1997), which states that

> [i]f an employer discovers grave misconduct on the part of a terminated employee which the employee might have been able to conceal had the employee not been terminated, the employer should nonetheless not be required to reinstate the employee or to pay prospective damages for the employee's termination. . . .

[46] *See Crittell v. Bingo*, 83 P.3d 532, 536 n.19 (Alaska 2004) (stating that reply brief "'may raise no contentions not previously

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## E. Emotional Distress Damages

### 1. APC did not preserve its challenge to the emotional distress damages award.

The jury awarded Reust $100,000 in emotional distress damages. On appeal APC argues that this award was improper because Reust did not demonstrate that he suffered severe emotional distress. APC waived this argument by failing to assert it below:[47] "As a general rule, this court will not consider arguments attacking a judgment for the first time on appeal."[48]

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raised in either the appellant's or appellee's briefs' ") (quoting Alaska R. App. P. 212(c)(3)).

[47] APC's briefs fail to specify where in the record this point was raised below. *See* Alaska R. App. P. 212(c)(8)(B). Our review of the record reveals that at trial APC objected to Reust's emotional distress damages claim on the ground it violated the Civil Rule 26 disclosure rule. During a discussion on jury instructions, APC stated, "we still believe that . . . emotional distress is improper," but specified no grounds for its objection. APC did not raise the issue of severity in its directed verdict motion. There is no indication APC brought to the trial court's attention any asserted deficiency in Reust's proof of the severity of his distress.

[48] *See Koller v. Reft*, 71 P.3d 800, 804 n.6 (Alaska 2003) (quoting *Mapco Express, Inc. v. Faulk*, 24 P.3d 531, 540 n.29 (Alaska 2001)) (quotation marks omitted).

### 2. Emotional distress damages were not preempted by the exclusive remedy provision of the Alaska Workers' Compensation Act.

APC argues that Reust's claim for emotional distress damages was preempted by the Alaska Workers' Compensation Act. This contention is without merit.[49] Alaska Statute 23.30.055[50] "establishes that an employer's workers' compensation liability, which the employer must pay irrespective of fault, 'is the exclusive remedy for an employee injured during the course of employment.'"[51] But we have held that the "socially beneficial purpose of the workers'

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[49] We review questions of law using our independent judgment. *Indus. Commercial Elec., Inc. v. McLees*, 101 P.3d 593, 597 (Alaska 2004). An Alaska statute is interpreted "according to reason, practicality, and common sense, taking into account the plain meaning and purpose of the law as well as the intent of the drafters." *Native Vill. of Elim v. State*, 990 P.2d 1, 5 (Alaska 1999); *see also Fyffe v. Wright*, 93 P.3d 444, 457 n.39 (Alaska 2004).

[50] AS 23.30.055 provides in part:

> The liability of an employer prescribed in AS 23.30.045 is exclusive and in place of all other liability of the employer and any fellow employee to the employee, the employee's legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from the employer or fellow employee at law or in admiralty on account of the injury or death. . . .

[51] *Gunter v. Kathy-O-Estates*, 87 P.3d 65, 70 (Alaska 2004) (quoting *Fenner v. Municipality of Anchorage*, 53 P.3d 573, 575 (Alaska 2002)).

compensation law would not be furthered by allowing a person who commits an intentional tort to use the compensation law as a shield against liability."[52] Likewise, it would be nonsensical to allow an employer to rely on the exclusive remedy section, AS 23.30.055, to preclude damages stemming from a public policy violation.[53] APC has directed us to no statutory text or legislative history suggesting that the Alaska Workers' Compensation Act was intended to provide a remedy for a discharge motivated by a violation of public policy.

### F. Punitive Damages

#### 1. The superior court did not err in denying APC's motion for directed verdict on the issue of punitive damages.

APC contends that punitive damages should not have been awarded "because APC's conduct was not shown by clear and convincing evidence to have been outrageous or reckless. . . ."[54] It argues that "Reust's

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[52] *Fenner*, 53 P.3d at 575 (quoting *Elliott v. Brown*, 569 P.2d 1323, 1327 (Alaska 1977)) (internal quotation marks omitted).

[53] *See, e.g., Accardi v. Superior Court*, 17 Cal. App. 4th 341, 21 Cal.Rptr.2d 292, 298 (Cal. App. 1993) (stating that "a claim for emotional and psychological damage, arising out of employment, is not barred [by an exclusive remedy provision] where the distress is engendered by an employer's illegal discriminatory practices").

[54] AS 09.17.020(b) provides: "The fact finder may make an award of punitive damages only if the plaintiff proves by clear

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claim that he has been the victim of witness retaliation is very thinly supported at best and any proof by him of this does not rise to the level of clear and convincing evidence." And even if Reust proved that APC "reacted to his deposition testimony," APC asserts that its conduct was not malicious or reckless because "[a] company's conduct in not wanting in its management an individual who falsely accused another of its managers of lying cannot be said to be outside limits of reasonable business conduct."

We have stated that "although a plaintiff may have enough evidence to support the underlying cause of action by a preponderance of the evidence, the plaintiff is required to further establish outrageous conduct on the part of the defendant by clear and convincing evidence before punitive damages are justified."[55] Thus, it does not matter that Reust might have failed to prove witness retaliation by clear and convincing evidence, because that standard of proof applies to proving the outrageousness of APC's conduct, not to proving the underlying tort. APC's second contention – that any witness retaliation was reasonable because Reust allegedly provided untruthful

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and convincing evidence that the defendant's conduct (1) was outrageous, including acts done with malice or bad motives; or (2) evidenced reckless indifference to the interest of another person." *See also Robles v. Shoreside Petroleum, Inc.*, 29 P.3d 838, 846 (Alaska 2001) (quoting *Chizmar v. Mackie*, 896 P.2d 196, 210 (Alaska 1995)).

[55] *Nelson v. Progressive Corp.*, 976 P.2d 859, 864-65 (Alaska 1999).

testimony in his *Jantz* deposition – has no theoretical relevance here: APC produced no evidence at trial to support a claim that it terminated Reust because he had testified falsely. APC has not convinced us that we "must intervene to prevent a miscarriage of justice,"[56] and we therefore affirm the superior court's denial of APC's motion for a directed verdict on the issue of punitive damages.

### 2. The punitive damages cap and allocation statutes are constitutional.

Reust challenges AS 09.17.020(f) and (j) on various constitutional grounds.[57] Subsection .020(f) is one of the punitive damages caps and subsection .020(j) is the allocation provision of the 1997 Alaska tort reform legislation.[58]

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[56] *Great Divide Ins. Co. v. Carpenter ex rel. Reed*, 79 P.3d 599, 615 (Alaska 2003) (Matthews, J., concurring) (stating that "we will reverse a punitive damages award only if we have a firm conviction based on the record as a whole that the trial court erred and we must intervene to prevent a miscarriage of justice") (internal quotation marks omitted) (quoting *State Farm Mut. Auto. Ins. Co. v. Weiford*, 831 P.2d 1264, 1266 (Alaska 1992)); *see also Alaskan Vill., Inc. v. Smalley*, 720 P.2d 945, 948 (Alaska 1986).

[57] Constitutional issues are issues of law and subject to de novo review. *State v. Alaska Civil Liberties Union*, 978 P.2d 597, 603 (Alaska 1999).

[58] Ch. 26, SLA 1997. AS 09.17.020(f)-(h) imposes various caps on punitive damages awards. We discuss the cap applicable to this case in Part III.F.3. AS 09.17.020(j) requires that fifty

(Continued on following page)

### a. Due process

Reust contends that applying the tort reform legislation to his case violated the due process clauses of the state and federal constitutions. He asserts that the tort reform legislation applies only to tort causes of action and that, because his claim is for breach of contract, applying the punitive damages cap to his award was arbitrary and irrational. APC responds, correctly, that a plain reading of AS 09.17.020 indicates that it applies to all actions in which punitive damages are awarded.[59] And, as APC notes, Alaska law does not permit punitive damages for breach of contract, except when "the conduct constituting the breach is also a tort for which punitive damages are recoverable."[60] This means that Reust's punitive damages award lies in tort, which would place it within the ambit of the tort reform legislation even if the legislation did not apply to punitive damages stemming from breach of contract claims.[61]

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percent of a punitive damages award be deposited in the state's general fund. Reust describes this as a "forfeiture" provision.

[59] The tort reform legislation applies to "*an action* in which a claim of punitive damages is presented to the fact finder. . . ." AS 09.17.020(a) (emphasis added).

[60] *McKibben v. Mohawk Oil Co., Ltd.*, 667 P.2d 1223, 1232 (Alaska 1983) (citing RESTATEMENT (SECOND) OF CONTRACTS § 355 (1981)).

[61] *See ARCO Alaska, Inc. v. Akers*, 753 P.2d 1150, 1154 (Alaska 1988) (stating that "where a party's conduct in breaching a contract rises to the level of a traditionally recognized tort, such as intentional infliction of emotional distress, an action in tort would lie").

We are therefore unconvinced by Reust's "arbitrariness and irrationality" argument.

Reust also claims that the statutes capping punitive damages awards and requiring payment of fifty percent of such awards to the state violate due process because they infringe on fundamental rights without a compelling or legitimate purpose. He points out that the United States Supreme Court has treated punitive damages as quasi-criminal.[62] According to Reust, retribution is a legitimate justification for awarding punitive damages between private parties, but it is not a legitimate purpose for Alaska's penal administration. The award here, Reust claims, contains inseparable components for retribution and deterrence. Because the state has no interest in retribution, Reust concludes that it cannot have an interest in his punitive damages award.

In *Evans ex rel. Kutch v. State* we concluded that because interests in "unlimited [punitive] damages are merely economic, the State's objectives need only be 'legitimate' – not 'compelling' – to justify the State's action."[63] We then concluded that the state's

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[62] *See Cooper Indus., Inc. v. Leatherman Tool, Inc.*, 532 U.S. 424, 432, 149 L. Ed. 2d 674, 121 S. Ct. 1678 (2001).

[63] *Evans ex rel. Kutch v. State*, 56 P.3d 1046, 1053 (Alaska 2002) (citing *Reid v. Williams*, 964 P.2d 453, 458 (Alaska 1998)). Chief Justice Fabe, joined by Justice Eastaugh, wrote the court's dispositional opinion. Justices Bryner and Carpeneti dissented in part. The four justices participating in *Evans* were evenly divided on two issues: "the constitutionality of the Tort Reform act's cap on noneconomic damages and its requirement that half

(Continued on following page)

objectives in establishing the punitive damages caps were legitimate.[64] Those objectives are independent of any "quasi-criminal nature" of punitive damages,[65] and Reust does not challenge the objectives as illegitimate. Accordingly, Reust's claim that the punitive damages caps lack a compelling or legitimate purpose fails.

This court was evenly divided in *Anderson v. State ex rel. Central Bering Sea Fishermen's Ass'n* (*Anderson II*)[66] regarding the constitutionality of AS

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of punitive damages awards be paid to the State. . . ." *Id.* at 1070 n.140. On these two issues, the *Evans* dispositional opinion affirmed the superior court's ruling but did not create precedent. *See Hammond v. State, Dep't of Transp. & Pub. Facilities*, 107 P.3d 871, 883 n.7 (Alaska 2005) ("A decision by an evenly divided court results in an affirmance. The opinion agreeing with the result reached by the superior court is referred to as the dispositional opinion, but it does not have the precedential effect of an opinion of the court."). On all other issues present in *Evans* "at least three justices agree[d]; therefore, the court's decision on these issues does have precedential value and is binding on future cases." *Evans*, 56 P.3d at 1070 n.140.

[64] *Evans*, 56 P.3d at 1053.

[65] The objectives include "(1) discouraging frivolous litigation and decreasing the costs of litigation; (2) stopping excessive punitive damages awards in order to foster a positive business environment; (3) controlling the increase of liability insurance rates; (4) encouraging self-reliance and independence by underscoring the need for personal responsibility; and (5) reducing the cost of malpractice insurance for professionals." *Evans*, 56 P.3d at 1053 (citing ch. 26, § 1(1-5), SLA 1997) (citations and internal quotation marks omitted).

[66] *Anderson v. State ex rel. Cent. Bering Sea Fishermen's Ass'n* (*Anderson II*), 78 P.3d 710 (Alaska 2003). Justice Matthews,

(Continued on following page)

09.17.020(j), the statute that allocates fifty percent of punitive damages awards to the state. The court's dispositional opinion discusses the reasons why we now hold that AS 09.17.020(j) does not violate substantive due process:

> Allocating half of all punitive damage awards to the state will reduce the incentive for plaintiffs to pursue punitive damages claims. The statute will also encourage plaintiffs to settle their cases since the state only shares in punitive damages when an award is made. These incentives could reduce both the overall number of punitive damage claims as well as the number of punitive damage claims that actually go to trial. This effect could reasonably be expected to have a moderating influence on liability insurance premiums. Further, the incentive to settle punitive damage claims could reduce the length and complexity of litigation, thereby reducing the overall cost of litigation. The state's expectation that AS 09.17.020(j) will help to fulfill these purposes is at least minimally rational.[67]

The dispositional opinion in *Anderson II* also concluded that "increasing state revenues by allocating a portion of punitive damages awards to the

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joined by Justice Eastaugh, authored the dispositional opinion regarding the constitutionality of AS 09.17.020(j); Justices Bryner and Carpeneti dissented in part.

[67] *Id.* at 717 (internal footnote omitted).

state based on the analogy between such awards and civil and criminal fines is a legitimate public policy choice."[68] Dissenting in part, Justice Bryner, joined by Justice Carpeneti, argued that the allocation statute was not minimally rational because "the only way that subsection (j) discourages punitive damages claims is by punishing any claimant who files a meritorious claim, successfully pursues it to completion, and receives a factually accurate and lawfully authorized judgment."[69] We do not share this view. It is rational to expect that fewer punitive damages claims will be filed and that more will be settled if the potential payoff is capped or reduced by allocating half of any punitive damages awards to the state. Justice Bryner's partial dissent also argued that "[j]ust as cost savings alone do not sustain otherwise arbitrary state action, so revenue earning is not, in itself, a legitimate legislative purpose."[70] But in our view, the state action is not arbitrary here because the objectives of punitive damages are analogous to the objectives of civil and criminal fines. The decision to increase state revenues by allocating a portion of punitive damages awards to the state is therefore legitimate. We hold that AS 09.17.020(j) does not violate substantive due process for the reasons expressed in the dispositional opinion in *Anderson II*.

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[68] *Id.* at 718.

[69] *Id.* at 724 (Bryner, J., dissenting in part).

[70] *Anderson II*, 78 P.3d at 724 (Bryner, J., dissenting in part).

### b. Equal protection

Reust argues that the punitive damages caps violate the equal protection clauses of the Alaska and United States Constitutions. He claims that the tort reform legislation discriminates between two classes of litigants – those who receive full recovery and those whose recovery is capped. This exact argument was presented and rejected in *Evans*.[71]

### c. Right to jury trial

Reust argues that the punitive damages cap violates the right to a jury trial provided by the Alaska Constitution.[72] This argument was rejected in *Evans*, where a majority of this court agreed that "the decision to place a cap on [punitive] damages awarded is a policy choice and not a re-examination of the factual question of damages determined by the jury."[73] Reust urges a reconsideration of this conclusion, arguing that "[a] constitutional protection cannot be bypassed by allowing it to exist in form but not letting it have an effect in function." We see no compelling reason to revisit *Evans*'s holding on this issue.

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[71] The dispositional opinion rejected the argument that the punitive damages caps violate equal protection. *Evans*, 56 P.3d at 1051-55.

[72] Alaska Const. art. I, § 16.

[73] *Evans*, 56 P.3d at 1051.

### d. Takings

Reust claims that the allocation requirement in AS 09.17.020(j) is a taking because it deprives him of a property right in his punitive damages claim.[74] We addressed this issue most recently in *Anderson II*.[75] The dispositional opinion concluded that AS 09.17.020(j) does not violate the takings clauses of the Alaska Constitution or the Federal Constitution.[76] The opinion gave two reasons. First, it determined that Anderson's claim for punitive damages was only protected property insofar as permitted by AS 09.17.020(j).[77] Anderson's unlitigated claim only became property when it accrued, and a claim cannot accrue before the events that give rise to it occur.[78]

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[74] Reust also asserts that subsection .020(j) is void on its face because it requires attorneys to perform services without just compensation. There is no need to address this argument because we have previously held that AS 09.60.080 requires that the superior court deduct pro rata the contingent fee from the state's portion of the punitive damages award. *Anderson II*, 78 P.3d at 720-22.

[75] *Anderson II*, 78 P.3d at 714-16. We previously addressed the issue in *Evans*, 56 P.3d at 1058. The dispositional opinion in *Evans* concluded that the statute does not effect a taking because the statute limits a plaintiff's property interest in punitive damages before it vests. *Id.* The dispositional opinion noted that "this construction of AS 09.17.020(j) is consistent with the legislature's power to limit or abolish punitive damages. . . ." *Id.*

[76] *Anderson II*, 78 P.3d at 714-15.

[77] *Id.*

[78] *Id.* at 714.

Because Anderson's claim accrued after the August 7, 1997 effective date of AS 09.17.020(j), the scope of her claim was defined by existing state law.[79] Thus, AS 09.10.020(j) limited her claim – and therefore her property right – to one-half of any punitive damages award.[80]

Second, the dispositional opinion pointed to Anderson's reasonable expectations when her claim accrued.[81] It stated that because Anderson's reasonable expectations were controlled by the law in effect when her claim accrued and subsection .020(j) was then in effect, she could not reasonably expect to recover more than half of her punitive damages award.[82] We are persuaded by these arguments and apply them to Reust, whose claim accrued in April 1998, after AS 09.17.020(j) became effective.

Reust's brief cites the Colorado Supreme Court's decision in *Kirk v. Denver Publishing Co.* in support of his argument that AS 09.17.020(j) effects an unconstitutional taking.[83] The court held in *Kirk* that a Colorado punitive damages allocation statute was a

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[79] *Id.* at 714-15.

[80] *Id.* at 715.

[81] *Id.* (citing *State, Dep't of Natural Res. v. Arctic Slope Reg'l Corp.*, 834 P.2d 134 (Alaska 1991) (recognizing importance of reasonable expectations in constitutional takings claims); *Beluga Mining Co. v. State, Dep't of Natural Res.*, 973 P.2d 570, 576 (Alaska 1999) (same)).

[82] *Anderson II*, 78 P.3d at 715.

[83] *Kirk v. Denver Publ'g Co.*, 818 P.2d 262 (Colo. 1991).

taking because it applied after a final judgment was entered in the plaintiff's case and after the judgment was collected from the defendant.[84] The property interest in the punitive damages award therefore vested before a portion was taken by the state.[85] The dispositional opinion in *Evans* distinguished *Kirk* on the ground that the Colorado statute, unlike AS 09.17.020(j), applied after a final judgment was entered in the plaintiff's case.[86] In *Anderson II*, the dispositional opinion also disagreed with "'the implicit conclusion in *Kirk* that a plaintiff has a greater property interest in a judgment upon a tort claim than the interest recognized by law when the claim accrued.'"[87] Most other state supreme courts have upheld against takings challenges statutes that allocate some part of punitive damages awards to governmental entities.[88]

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[84] *Id.* at 272-73.

[85] *Id.* at 268.

[86] *Evans*, 56 P.3d at 1058 n.74.

[87] *Anderson II*, 78 P.3d at 716 n.30 (quoting *DeMendoza v. Huffman*, 334 Ore. 425, 51 P.3d 1232, 1234 (Or. 2002) (quoting *Fust v. Attorney Gen.*, 947 S.W.2d 424, 431 (Mo. 1997))).

[88] *See, e.g., Gordon v. State*, 608 So.2d 800, 801-02 (Fla. 1992); *Mack Trucks, Inc. v. Conkle*, 263 Ga. 539, 436 S.E.2d 635, 639 (Ga. 1993); *Cheatham v. Pohle*, 789 N.E.2d 467, 472-75 (Ind. 2003); *Shepherd Components, Inc. v. Brice Petrides-Donohue & Assocs., Inc.*, 473 N.W.2d 612, 619 (Iowa 1991); *Fust v. Attorney Gen.*, 947 S.W.2d 424, 431 (Mo. 1997); *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 594 S.E.2d 1, 14-15 (N.C. 2004); *DeMendoza*, 51 P.3d at 1245-47.

In his partial dissent in *Anderson II*, Justice Bryner, joined by Justice Carpeneti, argued that AS 09.17.020(j) "neither redefines nor regulates the permissible scope of unlitigated punitive damages claims; instead, subsection .020(j) attempts to alter the plaintiff's property rights only after the plaintiff's claim accrues and is fully litigated, after the claim proves successful, and after the plaintiff 'receives an award.'"[89] Justice Bryner pointed to statutory language that specifies the source of forfeiture as "'the award'" that "'a person receives'" and that is available for deposit into the general fund of the state.[90] But the intent of the legislature was clearly to allocate a portion of punitive damages awards to the state.[91] Insofar as the *Anderson II* dispositional opinion's construction of the statutory language avoids a constitutional violation by redefining the permissible scope of unlitigated punitive damages claims, we now adopt that construction.[92] We therefore hold that AS 09.17.020(j) does not result in an unconstitutional taking.

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[89] *Anderson II*, 78 P.3d at 723 (Bryner, J., dissenting in part) (original emphasis) (quoting AS 09.17.020(j)).

[90] *Id.* at 723 n.4 (Bryner, J., dissenting in part) (quoting *Evans*, 56 P.3d at 1077).

[91] *Id.* at 717-18.

[92] *See Chenega Corp. v. Exxon Corp.*, 991 P.2d 769, 785 (Alaska 1999) (construing statute so as to avoid constitutional problems where reasonable to do so); *see also Bonjour v. Bonjour*, 592 P.2d 1233, 1237 (Alaska 1979); *Larson v. State*, 564 P.2d 365, 372 (Alaska 1977); *Hoffman v. State*, 404 P.2d 644, 646 (Alaska 1965).

### 3. The superior court applied the incorrect statutory cap.

Reust argues that if a punitive damages cap applies, the superior court should have applied AS 09.17.020(f), rather than AS 09.17.020(h). He is correct.

The superior court reduced the punitive damages award to $500,000 per AS 09.17.020(h), which lists increasing cap levels that depend on the employer's number of employees.[93] That subsection applies to "an action against an employer to recover damages for an unlawful employment practice prohibited by AS 18.80.220," which proscribes various forms of employment discrimination. Reust argues that his action does not fall under AS 18.80.220; rather, it is a claim for retaliatory wrongful discharge. Therefore, if any punitive damages cap were applicable, Reust claims it should have been the cap imposed by AS 09.17.020(f). That subsection states that, "[e]xcept as provided in (g) and (h) of this section, an award of punitive damages may not exceed the greater of

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[93] AS 09.17.020(h) states:

> Notwithstanding any other provision of law, in an action against an employer to recover damages for an unlawful employment practice prohibited by AS 18.80.220, the amount of punitive damages awarded by the court or jury may not exceed (1) $200,000 if the employer has less than 100 employees in this state; (2) $300,000 if the employer has 100 or more but less than 200 employees in this state; (3) $400,000 if the employer has 200 or more but less than 500 employees in this state; and (4) $500,000 if the employer has 500 or more employees in this state.

(1) three times the amount of compensatory damages awarded to the plaintiff in the action; or (2) the sum of $500,000."

APC argues that because Alaska did not recognize a wrongful discharge tort when the tort reform legislation was enacted, the trial court correctly applied AS 09.17.020(h). According to APC, AS 18.80.220 provided the only known cause of action for awarding punitive damages in the context of employment termination, so "the legislature could well have concluded that it had adequately described the cap for termination torts by the manner in which the subsection (h) cap was drafted."

Alaska Statute 09.17.020(h) limits punitive damages recoveries in AS 18.80.220 discrimination cases, but does not purport to limit awards for all types of torts arising from an improper termination. For example, APC concedes that AS 09.17.020(h) does not address torts such as intentional infliction of emotional distress or defamation that may arise from a non-discriminatory termination. APC cites no legislative history suggesting that the legislature intended AS 09.17.020(h) to have a broader application beyond awards in discrimination cases arising under AS 18.80.220. Because we conclude that AS 09.17.020(h) does not apply here, we remand for application of AS 09.17.020(f).

Once the correct punitive damages award has been determined under the statutory cap, it will also be necessary for the superior court to ensure that the award is not excessive per the statutory factors listed

in AS 09.17.020(c)[94] and the three "guideposts" outlined by the United States Supreme Court.[95]

### G. The Superior Court Did Not Abuse Its Discretion in Allowing the State of Alaska To Intervene.

Reust argues that the superior court should not have allowed the State of Alaska to intervene either as a matter of right or permissively.[96] The state responds that intervention was appropriate for both reasons and, even if it were not, it was entitled to intervene under Alaska Rule of Civil Procedure 24(c) because Reust challenged the constitutionality of a

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[94] *See Cent. Bering Sea Fishermen's Ass'n v. Anderson (Anderson I)*, 54 P.3d 271, 282 (Alaska 2002).

[95] *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574-75, 134 L. Ed. 2d 809, 116 S. Ct. 1589 (1996); *see also State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418-21, 155 L. Ed. 2d 585, 123 S. Ct. 1513 (2003) (applying *Gore* factors); *Anderson I*, 54 P.3d at 284 (same).

[96] "A lower court's decision on a motion to intervene is reviewed for an abuse of discretion." *Mundt v. Northwest Explorations, Inc.*, 947 P.2d 827, 829 (Alaska 1997).

state statute.[97] We agree that Rule 24(c) justifies the state's intervention.[98]

Intervention as a matter of right is appropriate

> when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Alaska R. Civ. P. 24(a).

Permissive intervention is appropriate "when an applicant's claim or defense and the main action have a question of law or fact in common" and

> when a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal

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[97] Alaska Civil Rule 24(c) states, in part:

> When the constitutionality of a state statute affecting the public interest is drawn in question in any action to which the state or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of Alaska of such fact, and the state shall be permitted to intervene in the action.

[98] Although Reust filed his motion challenging the constitutionality of AS 09.17.020 after the superior court granted the state's motion to intervene, Reust's challenge had the effect of rendering any possible error by the superior court harmless. The constitutional challenge would have permitted intervention even if the superior court had denied it previously.

> or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action.

Alaska R. Civ. P. 24(b).

In addition, it appears that the state should always be permitted to intervene when there is any dispute about how a punitive damages award is to be allocated. Other recent cases have presented equivalent disputes, such as whether pro rata attorney's fees and costs should be deducted from the state's allocation.[99] Indeed, we have a difficult time imagining how the state could be denied intervention in such cases.

### H. The Timing of the Entry of Judgment Was Appropriate.

Reust argues that the superior court unfairly delayed entry of judgment, causing a lower interest rate to apply to his award. The jury returned its first verdict on January 11, 2001 and then awarded punitive damages by supplemental verdict of April 24, 2001. But the superior court did not sign the interim final judgment until June 11, 2002.

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[99] *See, e.g., Anderson v. State ex rel. Cent. Bering Sea Fishermen's Ass'n (Anderson II)*, 78 P.3d 710, 720-22 (Alaska 2003).

APC correctly points out that disputed post-verdict motions were pending before the superior court until the interim final judgment was entered on June 11, 2002. For example, on March 1, 2002 Reust submitted a motion asking the court to declare unconstitutional the tort reform statute. In addition, some of the delay was due to Reust's own request to hold matters in abeyance pending mediation between the parties. The superior court was therefore justified in delaying entry of judgment.

## IV. CONCLUSION

For these reasons, we REMAND for reduction of the lost wages awards in accordance with this opinion, for application of the punitive damages cap set out in AS 09.17.020(f), and for review of the recalculated punitive damages award for excessiveness. We AFFIRM the remainder of the superior court's rulings variously challenged by APC or Reust.

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**DISSENT BY:** BRYNER

**DISSENT**

BYNER, Chief Justice, with whom CARPENETI, Justice, joins, dissenting, in part.

I disagree with the court's decision to uphold Alaska's punitive damages forfeiture statute. For the most part, I rely on the reasons set out in my

dissenting opinions in *Anderson II*[1] and *Evans v. State*;[2] but I add one comment below to address a point regarding punitive damages forfeiture that is newly raised in today's opinion.

The opinion suggests that the punitive damages forfeiture law can be sustained as minimally rational because it is similar to a fine: "the objectives of punitive damages," the court declares, "are analogous to the objectives of civil and criminal fines."[3] Of course, fines and punitive damages undoubtedly do have the same general purpose. But beyond its reliance on this truism, the court's proposed analogy between fines and forfeiture breaks down and becomes unconvincing: After all, unlike the punitive damages forfeiture provision, our justice system does not require the victim to prosecute the offender; nor does it force the prosecutor to pay the fine. So while the punitive damages forfeiture statute nominally serves the same purpose as a fine, it hardly advances this purpose in a rational manner.

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[1] *Anderson v. State ex rel. Central Bering Sea Fishermen's Ass'n*, 78 P.3d 710, 723-24 (Alaska 2003) (*Anderson II*).

[2] *Evans ex rel. Kutch v. State*, 56 P.3d 1046, 1075-76 (Alaska 2002).

[3] Slip Op. at 30.

IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT KENAI

| | | |
|---|---|---|
| DAN REUST,<br>Plaintiff,<br>v.<br>ALASKA PETROLEUM CONTRACTORS, INC.,<br>Defendant. | ) | Case No.<br>3KN-99-132 Civil |

**ORDER GRANTING APC'S MOTION TO ENFORCE SETTLEMENT AGREEMENT**

The Court, having considered defendant Alaska Petroleum Contractors, Inc.'s ("APC's") motion to enforce settlement agreement, and any opposition thereto, hereby ORDERS that:

1. APC's motion is GRANTED.

2. APC's settlement agreement with plaintiff Dan Reust is valid and enforceable; and

3. Pursuant to that settlement agreement, Mr. Reust must defend and indemnify APC in this litigation.

IT IS SO ORDERED.

DATED this 8th day of Dec., 2006.

/s/ Charles T. Huguelet
CHARLES T. HUGUELET
Superior Court Judge

IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT KENAI

| | | |
|---|---|---|
| DAN REUST,<br>Plaintiff,<br>v.<br>ALASKA PETROLEUM CONTRACTORS, INC.<br>Defendant,<br>and<br>STATE OF ALASKA,<br>Intervenor. | ) | Superior Court No. 3KN-99-132 CI |

**FINAL JUDGEMENT**

IT IS ORDERED that judgment is entered as follows: Intervenor State of Alaska, pursuant to this Court's May 25, 2007 Order Awarding Punitive Damages, shall recover from and have judgment against Alaska Petroleum Contractors (or plaintiff pursuant to the plaintiff and defendant's settlement agreement) as follows:

a. Total Judgment $207,792.40[1]

b. Post-Judgment Interest Rate: 9.25 %

DATED in Kenai, Alaska, this 11th day of July, 2007

/s/ Charles T. Huguelet
CHARLES T. HUGUELET
Superior Court Judge

**CERTIFICATION OF DISTRIBUTION**

I certify that a copy of the foregoing was mailed to the following at their addresses of record:

/s/ Robinson, Parker, AGO,

Date 7/12/07 Clerk AL

[1] Punitive damages were $716,525.52. The Court has determined that Plaintiff Dan Reust's counsel is entitled to 42% of this amount in attorney's fees, for a total of $300,940.71. This leaves $415,584.81 for punitive damages of which the State is entitled to half. Fifty percent of this amount is $207,792.40.

Dan Reust, Appellant, v. Alaska Petroleum Contractors, Inc., and State of Alaska, Appellees.

Supreme Court No. S-12863

SUPREME COURT OF ALASKA

2009 Alas. LEXIS 79

May 15, 2009, Decided

NOTICE: DECISION WITHOUT PUBLISHED OPINION

PRIOR HISTORY: [*1]

Trial Court Case # 3KN-99-00132CI.
Reust v. Alaska Petroleum Contrs., Inc., 206 P.3d 437, 2009 Alas. LEXIS 30 (Alaska, 2009)

JUDGES: Before: Fabe, Chief Justice, Eastaugh, Carpeneti, and Winfree, Justices. [Matthews, Justice, not participating.]

OPINION

Order
Petition for Rehearing

On consideration of the Petition for Rehearing filed on 4/20/09, and the response filed on 5/7/09,

IT IS ORDERED:

The Petition for Rehearing is DENIED.

Entered by the direction of the court.

Alaska Statute

Sec. 09.17.020. Punitive damages.

(a) In an action in which a claim of punitive damages is presented to the fact finder, the fact finder shall determine, concurrently with all other issues presented, whether punitive damages shall be allowed by using the standards set out in (b) of this section. If punitive damages are allowed, a separate proceeding under (c) of this section shall be conducted before the same fact finder to determine the amount of punitive damages to be awarded.

(b) The fact finder may make an award of punitive damages only if the plaintiff proves by clear and convincing evidence that the defendant's conduct

(1) was outrageous, including acts done with malice or bad motives; or

(2) evidenced reckless indifference to the interest of another person.

(c) At the separate proceeding to determine the amount of punitive damages to be awarded, the fact finder may consider

(1) the likelihood at the time of the conduct that serious harm would arise from the defendant's conduct;

(2) the degree of the defendant's awareness of the likelihood described in (1) of this subsection;

(3) the amount of financial gain the defendant gained or expected to gain as a result of the defendant's conduct;

(4) the duration of the conduct and any intentional concealment of the conduct;

(5) the attitude and conduct of the defendant upon discovery of the conduct;

(6) the financial condition of the defendant; and

(7) the total deterrence of other damages and punishment imposed on the defendant as a result of the conduct, including compensatory and punitive damages awards to persons in situations similar to those of the plaintiff and the severity of the criminal penalties to which the defendant has been or may be subjected.

(d) At the conclusion of the separate proceeding under (c) of this section, the fact finder shall determine the amount of punitive damages to be awarded, and the court shall enter judgment for that amount.

(e) Unless that evidence is relevant to another issue in the case, discovery of evidence that is relevant to the amount of punitive damages to be determined under (c)(3) or (6) of this section may not be conducted until after the fact finder has determined that an award of punitive damages is allowed under (a) and (b) of this section. The court may issue orders as necessary, including directing the parties to have the information relevant to the amount of punitive

damages to be determined under (c)(3) or (6) of this section available for production immediately at the close of the initial trial in order to minimize the delay between the initial trial and the separate proceeding to determine the amount of punitive damages.

(f) Except as provided in (g) and (h) of this section, an award of punitive damages may not exceed the greater of

(1) three times the amount of compensatory damages awarded to the plaintiff in the action; or

(2) the sum of $500,000.

(g) Except as provided in (h) of this section, if the fact finder determines that the conduct proven under (b) of this section was motivated by financial gain and the adverse consequences of the conduct were actually known by the defendant or the person responsible for making policy decisions on behalf of the defendant, it may award an amount of punitive damages not to exceed the greatest of

(1) four times the amount of compensatory damages awarded to the plaintiff in the action;

(2) four times the aggregate amount of financial gain that the defendant received as a result of the defendant's misconduct; or

(3) the sum of $7,000,000.

(h) Notwithstanding any other provision of law, in an action against an employer to recover damages for an unlawful employment practice prohibited by AS

18.80.220, the amount of punitive damages awarded by the court or jury may not exceed

(1) $200,000 if the employer has less than 100 employees in this state;

(2) $300,000 if the employer has 100 or more but less than 200 employees in this state;

(3) $400,000 if the employer has 200 or more but less than 500 employees in this state; and

(4) $500,000 if the employer has 500 or more employees in this state.

(i) Subsection (h) of this section may not be construed to allow an award of punitive damages against the state or a person immune under another provision of law. In (h) of this section, "employees" means persons employed in each of 20 or more calendar weeks in the current or preceding calendar year.

(j) If a person receives an award of punitive damages, the court shall require that 50 percent of the award be deposited into the general fund of the state. This subsection does not grant the state the right to file or join a civil action to recover punitive damages.

(k) In a civil action in which an employer is determined to be vicariously liable for the act or omission of an employee, punitive damages may not be awarded against the employer under principles of vicarious liability unless (1) the employer or the

employer's managerial agent (A) authorized the act or omission and the manner in which the act was performed or omission occurred; or (B) ratified or approved the act or omission after the act or omission occurred; or (2) the employee (A) was unfit to perform the act or avoid the omission and the employer or the employer's managerial agent acted recklessly in employing or retaining the employee; or (B) was employed in a managerial capacity and was acting within the scope of employment. In this subsection, "managerial agent" means a management level employee with the stature and authority to exercise control, discretion, and independent judgment over a certain area of the employer's business and with some power to set policy for the employer.

COLORADO REVISED STATUTES

*** ARCHIVE MATERIAL ***

*** THIS SECTION IS CURRENT THROUGH THE 1992 SUPPLEMENT (1992 SESSIONS) ***

TITLE 13. COURTS AND COURT PROCEDURE DAMAGES
DAMAGES
ARTICLE 21. DAMAGES
PART 1. GENERAL PROVISIONS

C.R.S. 13-21-102 (1992)

13-21-102. Exemplary damages

(1)(a) In all civil actions in which damages are assessed by a jury for a wrong done to the person or to personal or real property, and the injury complained of is attended by circumstances of fraud, malice, or willful and wanton conduct, the jury, in addition to the actual damages sustained by such party, may award him reasonable exemplary damages. The amount of such reasonable exemplary damages shall not exceed an amount which is equal to the amount of the actual damages awarded to the injured party.

(b) As used in this section, "willful and wanton conduct" means conduct purposefully committed which the actor must have realized as dangerous, done heedlessly and recklessly, without regard to consequences, or of the rights and safety of others, particularly the plaintiff.

(2) Notwithstanding the provisions of subsection (1) of this section, the court may reduce or disallow the award of exemplary damages to the extent that:

(a) The deterrent effect of the damages has been accomplished; or

(b) The conduct which resulted in the award has ceased; or

(c) The purpose of such damages has otherwise been served.

(3) Notwithstanding the provisions of subsection (1) of this section, the court may increase any award of exemplary damages, to a sum not to exceed three times the amount of actual damages, if it is shown that:

(a) The defendant has continued the behavior or repeated the action which is the subject of the claim against the defendant in a willful and wanton manner, either against the plaintiff or another person or persons, during the pendency of the case; or

(b) The defendant has acted in a willful and wanton manner during the pendency of the action in a manner which has further aggravated the damages of the plaintiff when the defendant knew or should have known such action would produce aggravation.

(4) One-third of all reasonable damages collected pursuant to this section shall be paid into the state general fund. The remaining two-thirds of

such damages collected shall be paid to the injured party. Nothing in this subsection (4) shall be construed to give the general fund any interest in the claim for exemplary damages or in the litigation itself at any time prior to payment becoming due.

(5) Unless otherwise provided by law, exemplary damages shall not be awarded in administrative or arbitration proceedings, even if the award or decision is enforced or approved in an action commenced in a court.

(6) In any civil action in which exemplary damages may be awarded, evidence of the income or net worth of a party shall not be considered in determining the appropriateness or amount of such damages.

## RELEASE AND SETTLEMENT AGREEMENT

This settlement and release agreement ("Agreement") is made between and entered into by Dan Reust, plaintiff and releasor, and ASRC Energy Services Operations & Maintenance, Inc., fka Alaska Petroleum Contractors, Inc. (hereinafter "AESOM") a business corporation, doing business in the State of Alaska, defendant and released party. The parties agree as follows:

1. Release.

In return for consideration set forth in paragraph (2) below, Dan Reust forever releases and forever discharges AESOM, its past, present and future shareholders, directors, officers, employees, insurers, attorneys, contractors, servants, representatives, parent companies, subsidiaries, affiliates, predecessors, and successors-in-interest (hereinafter "released parties"), from any and all actual or potential claims, liquidated and unliquidated, demands, suits, causes of action, lawsuits and liabilities (hereinafter "Claims") of any kind by Dan Reust against AESOM. It is Dan Reust's intent and understanding that this release applies whether the Claims are known or unknown to Dan Reust and whether the same may hereafter arise, develop, be discovered or accrue, including without limiting the generality of the foregoing, any and all claims and causes of action which were asserted by Dan Reust against AESOM in the lawsuit filed in the Superior Court for the State of

Alaska, Third Judicial District, Kenai, Alaska entitled Dan Reust v. Alaska Petroleum Contractors, Inc., Cause No. 3KN-99-132 Civil, (hereinafter the "Lawsuit") including those asserted on appeal of the Lawsuit.

Dan Reust understands that he is releasing all of his past and future claims against the released parties, including but not limited to, pain and suffering, (mental or physical), loss of or damage to the relationship between the parties, lost past and future income, past and future medical expense, personal injury of any kind, mental or emotional distress or anguish, punitive damages, disability, pecuniary loss, interest, costs, expenses, attorney's fees, consequential damage and any other damages of any kind or nature that he may have suffered as a result of any action or inaction of any kind on the part of AESOM occurring prior to this Agreement.

Without limiting the generality of the foregoing, Dan Reust also specifically understands he will never again be able to collect any money from the released parties on account of the incidents described in the Lawsuit or that could have been described in the Lawsuit.

Dan Reust understands that in making this Agreement and releasing the released parties, that he has outstanding claims in a sum unknown to him at this time that could result in a court award of money or a court money judgment in his favor and against the released parties. Dan Reust agrees that in return

for the consideration paid by AESOM to him, that no court award or court judgment shall be entered against AESOM in the Lawsuit. Dan Reust agrees to stipulate with the released parties that upon payment of consideration by AESOM to him to dismiss the lawsuit with prejudice, and for each side to bear their own costs and attorney's fees.

2. Assumption of Risk; Interpleader.

Dan Reust assumes all risk that the State of Alaska has an enforceable claim for punitive damages in this case pursuant to AS 09.17.020(j). Dan Reust agrees to deduct from the settlement money the sum of Two Hundred Thousand Dollars $200,000.00 and place that money into the Alaska Court Registry, as interpleaded monies from which the State of Alaska may obtain payment for any claim it has for punitive damages, if such a claim exists. If the State of Alaska is entitled to more than this sum it shall be the sole responsibility of Dan Reust to pay any sum over the previously stated amount of money.

3. Consideration.

The consideration to be paid or provided for in exchange for the above release is a follows: AESOM shall pay the sum of One Million Dollars ($1,000,000.00) to Robinson & Associates in Trust for Dan Reust not later than March 18, 2006.

4. Indemnities; Responsibility for subrogated claims.

Dan Reust warrants that the claims released, herein have not been sold, transferred or assigned to any other person or entity and that no other person or entity has any right, title or interest in the claims released herein. Dan Reust warrants, represents, and promises that if the released parties are sued or any claim is made against them by anyone or any entity arising out of the Lawsuit or claims that are released, that he will defend, indemnify and hold the released parties completely harmless against the same. In particular, and without diminution of the foregoing, Dan Reust warrants, represents and promises that he will indemnify, defend and hold the released parties harmless against any claim by the State of Alaska for punitive damages against those persons or entities released, including any claim by the State of Alaska arising under AS 09.17.020(j).

Dan Reust further agrees that all payments to be made to him under this Agreement are, at his request, to be made on a lump sum basis and without withholding or contribution by AESOM for payroll or other federal or Oregon state income taxes. In consideration of his request and other and valuable consideration given to him under this Agreement, Dan Reust warrants, represents and promises that he shall indemnify, defend and hold the released parties released harmless against any claims by the Internal Revenue Service, Oregon Department of Revenue or any similar governmental taxing entity for unpaid income taxes, Social Security, FUTA, Unemployment

or any other contributions and employer contributions on payments made to Reust under this Agreement.

Dan Reust understands, warrants, represents and promises that he waives any and all claims to ancillary fringe benefits that he might have received had he been employed by AESOM commencing in April 1998, including retirement contributions, insurance benefits, or any other benefits of any kind.

5. Fully Understood.

The parties hereby declare that the terms of this Agreement have been completely read and fully understood, that they are competent to sign this agreement or have based on informed consent authorized their attorney to sign for them, and that each party voluntarily accepts all such terms for the purpose of making a full and final release of any and all claims set forth above, disputed or otherwise.

6. Waiver of case law protections.

Dan Reust acknowledges that he has been advised by his attorney of the decisions of the Alaska Supreme Court in the case of Young v. State, 455 P.2d 889 (Alaska 1969) and Witt v. Watkins, 579 P.2d 1065 (Alaska 1978). Despite the holdings of these cases, Dan Reust states that it is his intent and desire to fully release any and all individuals, firms, or corporations who at any future date might be possible

defendants in any action arising out of facts and issues raised in the Lawsuit or in events described above, whether or not they are specifically named in this Agreement.

In addition, it is Dan Reust's intention and it is the purpose of this Agreement to discharge the liability of the released parties for any and all claims arising out of the facts and issues raised in the Lawsuit. The parties each specifically understand and agree that each is entering into this Agreement understanding that all released parties are to be released by Dan Reust fully, completely and finally from all claims now known or raised or which may later become known or raised with the facts or issues described above.

The parties specifically release any right they may have now or hereafter to reform, rescind, modify or set aside this Agreement through mutual or unilateral mistake of fact or law or otherwise.

7. Limitation on Public Disclosures.

Dan Reust, including his attorneys, warrant, represent and promise that they shall not make public statements or otherwise in any manner initiate publicity about the fact and content of this Agreement. Filing of pleadings necessary for interpleading funds pursuant to Section 2 of this Agreement are exempted from this requirement as are necessary disclosures to the State of Alaska, Dan Reust's accountants and as required to governmental

agencies. However, pleadings necessary for and related to the interpleader action shall not contain opinion about the fact and amount of settlement other than that the settlement is acceptable and satisfactory to Dan Reust and his attorneys. Otherwise, neither Dan Reust nor his attorneys are free to comment publicly about the fact and content of the settlement and this Agreement other than to state, and only in response to inquiries, that "the parties reached an amicable and mutually acceptable settlement of their dispute."

8. Entire Agreement.

This Agreement is the exclusive, final and complete agreement between the parties hereto. Other than as set forth in this Agreement, no other promises have been made by either party with regard to the subject matter of this Agreement. This Agreement may be executed in several counterparts, each of which shall be deemed an original, but all of which shall constitute one and the same instrument. This Agreement shall be governed by the laws of the State of Alaska.

9. No Admissions.

The parties to this Agreement understand that by executing it, the released parties do not acknowledge or admit to any liability, culpability, or responsibility for any acts or omissions concerning the claims arising out of the Lawsuit. This Agreement is

entered into solely for the purposes of avoiding and terminating all further litigation between the parties of any kind, including any appeal issues whatsoever.

10. No Application For Employment.

Dan Reust agrees that he will never apply for or seek work at Arctic Slope Regional Corporation (ASRC) or any of its subsidiary companies including AESOM.

DATED 3/13/2006 /s/
Dan Reust